

EDITOR'S NOTE

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1
No. 86-6169-CSY
Status: GRANTED
CAPITAL CASE

Title: William Wayne Thompson, Petitioner
v.
Oklahoma

Docketed:
December 22, 1986

Court: Court of Criminal Appeals
of Oklahoma

Counsel for petitioner: Tepker Jr., Harry F.

Counsel for respondent: Lee, David W.

Entry	Date	Note	Proceedings and Orders
1	Nov 17 1986		Application for extension of time to file petition and order granting same until December 23, 1986 (White, November 18, 1986).
2	Dec 22 1986	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jan 21 1987		Brief of respondent Oklahoma in opposition filed.
5	Jan 29 1987		DISTRIBUTED. February 20, 1987
7	Feb 23 1987		Petition GRANTED. *****
9	Mar 12 1987		Order extending time to file brief of petitioner on the merits until May 8, 1987.
10	Mar 12 1987	G	Motion of petitioner for appointment of counsel filed.
11	Mar 23 1987		Motion for appointment of counsel GRANTED and it is ordered that Harry F. Tepker, Jr., Esquire, of Norman, Oklahoma, is appointed to serve as counsel for the petitioner in this case.
12	Mar 31 1987		Joint appendix filed.
13	Apr 30 1987		Order further extending time to file brief of petitioner on the merits until May 15, 1987.
14	Apr 29 1987		Brief amicus curiae of State Appellate Defender of IL filed.
15	May 7 1987		Brief amicus curiae of Amnesty International filed.
16	May 14 1987		Brief amicus curiae of National Legal Aid and Defender Association, et al. filed.
17	May 14 1987		Brief amicus curiae of American Bar Association filed.
18	May 15 1987		Brief amicus curiae of International Human Rights Law Group filed.
19	May 15 1987		Brief amicus curiae of American Society for Adolescent Psychiatry et al. filed.
20	May 15 1987		Brief amicus curiae of Child Welfare League of America, et al. filed.
21	May 16 1987		Brief amicus curiae of Defense for Children International-USA filed.
22	May 15 1987		Brief of petitioner William W. Thompson filed.
24	Jun 11 1987		Order extending time to file brief of respondent on the merits until July 15, 1987.
25	Jul 10 1987		Order further extending time to file brief of respondent on the merits until August 5, 1987.
26	Jul 31 1987		Order further extending time to file brief of respondent on the merits until August 12, 1987.
27	Aug 12 1987		Brief amicus curiae of Kentucky, et al. filed.

Entry	Date	Note	Proceedings and Orders
28	Aug 12 1987	Brief of respondent Oklahoma filed.	
29	Sep 2 1987	CIRCULATED.	
30	Aug 31 1987	SET FOR ARGUMENT. Monday, November 9, 1987. (3rd case).	
32	Oct 16 1987	X Reply brief of petitioner William W. Thompson filed.	
33	Nov 9 1987	ARGUED.	
34	Aug 14 1987	Record filed.	
35	Oct 30 1987	Record filed.	

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86-6169

No. _____

ORIGINAL

SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM WAYNE THOMPSON,

Petitioner

v.

STATE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

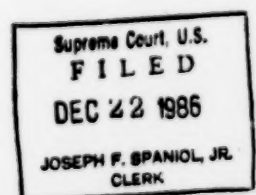
PETITION
FOR
WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

In a capital case against a sixteen year old defendant, the trial court admitted two gruesome photographs of the murder victim into evidence. The Court of Appeals stated that admitting the "ghastly, color" photographs into evidence was error that served no purpose other than to inflame the jury, but found that the error was harmless because evidence of the defendant's guilt was so strong. The first question presented is:

May the admission of inflammatory evidence in a capital case against a sixteen year old defendant be deemed harmless error merely because of strong evidence of guilt, when such evidence also prejudices the defendant's right to fair, full jury consideration of all mitigating circumstances-- including age-- during death penalty deliberations?

II

Whether the infliction of the death penalty on an individual who was a child of fifteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States?

PARTIES TO THE PROCEEDINGS BELOW

In the Court of Appeals of Oklahoma, Case No. F-84-29, the Appellant was William Wayne Thompson (petitioner in this action). The Appellee was the State of Oklahoma (respondent in this action).

In the District Court of Grady County, Oklahoma, Case No. CRF-83-45, the plaintiff was the State of Oklahoma and the defendant was William Wayne Thompson.

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OPINION BELOW

The opinion of the Court of Criminal Appeals is published as Thompson v. State at 724 P.2d 780. The opinion is reproduced in the Appendix.

There is no formal trial court opinion.

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. §1257 (3). The opinion of the Court of Criminal Appeals was entered on August 29, 1986. The Court of Criminal Appeals denied a timely petition for rehearing on September 24, 1986. On November 18, 1986, Mr. Justice White entered an order extending the time for petitioning for a writ of certiorari up to and including December 23, 1986.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. VI (excerpt):

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

U.S. Const., Amend. VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const., Amend. XIV (excerpt):

"No State shall . . . deprive any person of life . . . without due process of law . . ."

STATEMENT OF CASE

William Wayne Thompson, age sixteen, (hereinafter "the defendant") was convicted and sentenced to die for a first degree murder committed while he was still age fifteen. He had previously been certified to stand trial as an adult.

The evidence at trial showed that the defendant was the youngest of a group of four persons who participated in the murder of Charles Keene, defendant's former brother-in-law. He was the only minor child among the four accused of the crime. The victim had been abducted, beaten, shot twice and his throat, chest and abdomen had been cut. Witnesses for the prosecution overheard one of the men attacking Keene say, "[t]his is for the way you treated our sister." The apparent motive for the murder, according to this and other evidence introduced by the defense, was anger over Keene's alleged abuse and beating of Vicki Keene, the sister of two of the defendants.

The four accused of the crime were Anthony Mann (defendant's older brother), Bobby Glass, Richard Jones and the defendant. All were convicted in separate trials and all were sentenced to death.

The jury found one aggravating circumstance -- that the crime was "especially heinous, atrocious or cruel" -- but declined to accept the prosecutor's additional claim that the boy would commit violent criminal acts in the future.

During the guilt and penalty phases of the trial, the prosecutor introduced and emphasized two color photographs of the murder victim's body, which had been thrown into the Washita River and had remained there for almost a month. The Court of Criminal Appeals later characterized these photographs as "gruesome," and stated that "[a]dmitting them into evidence served no purpose other than to inflame the jury." 724 P.2d at 782.

"We do not understand why an experienced prosecutor would risk reversal of the whole case by introducing such ghastly, color photographs with so little probative value. We fail to see how they could possibly assist in the determination of defendant's guilt. The trial court's admission of these

two photographs was error."

Id. at 783.

Nevertheless, the Court of Criminal Appeals affirmed the judgment and sentence. The court held that the execution "of a minor certified to stand trial as an adult constitutes neither cruel nor unusual punishment." 724 P.2d at 784. The admission of the "ghastly, color photographs with so little probative value" was found to be harmless error because evidence of the defendant's guilt was "so strong." 724 P.2d at 783.

Preservation of Issues

As reported by the Court of Criminal Appeals, attorneys for the defendant challenged the admission of the photographs at trial and on appeal. Tr. Trans. 628-29; 724 P.2d at 783.

As noted by the Court of Criminal Appeals, the defendant also argued on appeal that the execution of a minor for a crime committed at age fifteen was cruel and unusual punishment that violated the Eighth and Fourteenth Amendments of the United States Constitution. 724 P.2d at 784; Brief of Appellant pp. 23-27.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

The introduction of inflammatory evidence in a capital case against a sixteen year old defendant cannot be deemed harmless error merely because of strong evidence of guilt. Such evidence also prejudices the defendant's right to fair, full jury consideration of all mitigating circumstances-- including age-- during death penalty deliberations.

"[W]here life itself is what hangs in the balance, a fine precision in the process must be insisted upon." Lockett v. Ohio, 438 U.S. 586, 620 (1978) (Marshall, J., concurring). Neither fine precision nor basic fairness was achieved in death penalty deliberations in this case.

The defendant was sentenced to death when the jury decided that one-- and only one-- aggravating factor was present. This determination was made-- despite the defendant's youth-- after the prosecutor repeatedly emphasized inflammatory, gruesome

photographs of the murder victim's remains.

Though the Oklahoma Court of Criminal Appeals condemned the prosecutor's actions and held that the trial court's decision to allow the inflammatory evidence was error, the appellate court used the incantation of "harmless error" to hold that defendant's death sentence was proper.

In this case, the misapplication of the harmless error concept denies the defendant's constitutional right to a full, fair consideration of all mitigating circumstances-- including the youth of the defendant-- as guaranteed by Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982).

- A. In closing argument during the penalty phase of the trial, the prosecutor repeatedly emphasized gruesome photographs that the Oklahoma Court of Criminal Appeals later described as inflammatory.

The Oklahoma Court of Criminal Appeals failed to consider fully the effect of evidence it had already found to be gruesome, ghastly, inflammatory, prejudicial, of little probative value and erroneously introduced. Specifically, the court did not examine or appreciate the effect of such evidence on the jury's deliberations during the penalty phase of trial.

The color photographs of the victim's body had been introduced to help establish the guilt of the accused. When the jury did not request to see the photographs while deliberating on the issue of guilt, the prosecutor complained in closing argument during the penalty phase:

"[T]here is something in this case that I want to tell you in the very beginning, I did not show you the photographs, you did not ask that the photographs of Charles Keene, the physical evidence be produced to you upstairs in the jury room in the first phase of this trial. I didn't, but you've got to ask for these exhibits to have them brought up to that jury room."

Tr. Trans. 848. Later in his closing argument, the prosecutor repeated his emphasis on the inflammatory evidence:

"And now for the first time you actually get to see photographs of the mutilated body of Charles Keene . . ."

Tr. Trans. 850. Still later, defense counsel complained about prosecutor's emphasis on these photographs.

"At this time, Judge, I'd like the record to reflect that Mr. Burns [the prosecutor] has placed on the podium . . . right in front of the jury various pictures of the deceased and in the past five or ten minutes has been waving them in front of the jury. The only value this has is to inflame the passions of the jurors."

Tr. Trans. 857. The judge overruled the defense counsel's objection, but warned the prosecutor to stop waving the pictures in front of the jury.

The prosecutor's conduct and tactics were not subtle. In closing argument, the prosecutor used the inflammatory evidence to distract the jury from what he described as "the problem": "[W]hat to do with a guilty person who has killed somebody else that is sixteen years old." Tr. Trans. 849. The prosecutor tried to deny the fact of the defendant's youth by arguing that he was an adolescent only in years. Id. After a detailed and graphic description of the crime with the aid of the inflammatory photographs, the prosecutor closed: "Its not the sixteen year old, folks, that can do that." Tr. Trans. 865.

The prosecutor's tactics-- aided by the inflammatory evidence-- were successful. Eventually, the jury recommended the death sentence on the sole basis of one statutory aggravating factor-- that the murder was especially heinous, cruel and atrocious. Tr. Trans. 870.

- B. In a capital case, the defendant has a right to full, fair consideration of all mitigating circumstances-- including age.

First degree murder is punishable by death or by life imprisonment. 21 Okla. Stat. §701.9 The Oklahoma system for imposing the death sentence requires the jury to find aggravating circumstances before imposing the death penalty. 21 Okla. Stat. §§ 701.10, 701.11, 701.12. 21 Okla. Stat. §701.12. Even if the jury finds an aggravating factor, the jury retains the discretion not to assess the death sentence whether or not the defense has offered mitigating evidence. Parks v. State, 651 P.2d 868 (Okla.

Cr. 1982).

As a result, "[i]n a capital sentencing proceeding before a jury, the jury is called upon to make a 'highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'" Turner v. Murray, ___ U.S. ___, 106 S.Ct. 1683, 1687 (1986) quoting Caldwell v. Mississippi, 472 U.S. ___, ___, n. 7, 105 S.Ct. 2633, 2645 n. 7 (1985) (quoting Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring)). Moreover, as this Court has consistently held, during the penalty phase of a capital case, juries and judges must give full and fair consideration to all mitigating factors, including the youth of the offender. Lockett v. Ohio, 438 U.S. 536 (1978); Bell v. Ohio, 438 U.S. 637 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). After Eddings, the importance of this principle should have been clear to the state of Oklahoma.

"Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. . . ."

455 U.S. at 115-116. Indeed, the language of the Court in Eddings reflects understandings about the nature of mitigating factors not easily communicated to a jury confronted with inflammatory, prejudicial, gruesome photographs of a murder victim and a prosecutor's repeated arguments that the defendant is not a normal sixteen year old. Tr. Trans. 266, 762, 849, 854.

"Eddings was not a normal 16 year old; he had been deprived of the care, concern and paternal attention that children deserve. . . . [I]t is not disputed that he was a juvenile with serious emotional problems. . . . All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is

itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing." 455 U.S. at 116 (emphasis added).

Since "in the end it is the jury that must make the difficult, individualized judgment as to whether the defendant deserves the sentence of death," Turner v. Murray, 106 S.Ct. at 1687, trial and appellate courts in any capital case must be sensitive to the possibility of prejudicing a jury at the penalty phase, as well as the guilt phase of trial.

"The qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." Id., 106 S.Ct. at 1688 (quoting California v. Ramos, 463 U.S. 992, 998-999 (1983)).

C. In a capital case, the introduction of inflammatory and gruesome evidence prejudicing jury deliberations over the death penalty cannot be dismissed as mere harmless error.

Appellate courts reviewing death penalty cases cannot fulfill their responsibilities to ensure that the defendant has received fair and full consideration by resorting to the incantation of "harmless error" based on evidence of guilt. To do so virtually repeats Oklahoma's error in Eddings, in which the Oklahoma Court of Criminal Appeals "considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability." 455 U.S. at 113.

As this Court stated in Zant v. Stephens, 462 U.S. 862 (1983):

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable

claim of error."

462 U.S. at 885.

In this case, the Oklahoma Court of Criminal Appeals used evidence of the defendant's guilt to find that obvious error was only harmless. The appellate court gave no scrutiny-- certainly not careful scrutiny-- whether the prosecutor's inflammatory evidence prejudiced the capital sentencing determination. In this context, the fact that the jury found only one aggravating factor justifying the death penalty renders the judgment indefensible. Cf. Watson v. Blackburn, 756 F.2d 1055 (5th Cir. 1985) (death sentence need not be overturned when one aggravating circumstance is invalidated only if other valid aggravating factors exist).

This Court must not rely on some speculative possibility that the jury might still have decided to sentence a fifteen-year-old defendant to die without the prejudicial evidence.

"Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper nonstatutory aggravating factors exerted a decisive influence on the sentence determination. The guarantee against cruel and unusual punishment demands more."

"[R]ational appellate review of capital sentencing decisions . . . requires more than mere speculation or conjecture as to what the sentencing tribunal would have decided had it correctly applied the law. Such post hoc justification of a sentencing decision, which depends on a rationale for imposing death distinct from that relied on by the sentencer, cannot fulfill the appellate court's constitutional responsibilities. . . . Only where the factors supporting the death sentence are so clear that proper application of the statute by reasonable persons could produce no other result should a sentence be affirmed despite constitutional error."

Proffitt v. Wainwright, 685 F.2d 1227, 1269 (11th Cir. 1982) cert. denied 464 U.S. 1002 (1983) (rejecting state's harmless

error argument, when court considered improper nonstatutory aggravating circumstances) quoting Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), vacated on other grounds ___ U.S. ___, 73 L.Ed.2d 1326 (1982). See also, e.g.: United States v. Gomer, 764 F.2d 1221 (7th Cir. 1985) (defendant need not show explicit reliance on an improper sentencing factor to obtain relief; it is sufficient to show that it was "not improbable" that the trial court was influenced by improper factors).

In Eddings and Lockett, this Court mandated that the death penalty should be imposed, if at all, only after juries undertake a careful, fair, sensitive, precise evaluation of all mitigating circumstances. In this case, the benefits of this procedural safeguard were effectively denied to the defendant by inflammatory, prejudicial evidence introduced by an over-zealous prosecution.

II

The execution of an individual who was a child of fifteen at the time of the crime is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

Oklahoma is one of only three states that has neither established a minimum age for imposing the death penalty nor explicitly provided that age is a mitigating factor in a capital case. Oklahoma is the only one of these three (Delaware and South Dakota are the other two) to have a juvenile on death row-- the defendant in the instant case.

The defendant was sentenced to death for a crime committed while he was still a child under the laws of Oklahoma. Yet Oklahoma has enacted no statute explicitly authorizing the execution of minors for crimes committed while still at the young age of fifteen. In 10 Okla. Stat. §1101, the term "child" is defined as "any person under the age of eighteen (18) years, except any person sixteen (16) or seventeen (17) years of age who is charged with murder" and certain other specified offenses. In 10 Okla. Stat. §1104.2, the state has provided that persons who are sixteen or seventeen and who are charged with murder are

automatically considered to be adult, unless the person successfully moves to be certified as a child. This "automatic" certification was not the basis for trying the defendant in this case as an adult.

The defendant in this case was certified to stand trial as an adult under a separate statute, 10 Okla. Stat. §1112. This statute allows a child of any age who is charged with an offense that would be a felony if committed by an adult to be tried as an adult, if (i) the state can establish "the prosecutive merit" of the case, and (ii) if the court certifies "that such child shall be held accountable for its acts as if he were an adult." This certification of accountability may occur only after the court has examined whether there are "prospects for reasonable rehabilitation of the child."

Again, there appears to be no explicit minimum age limit on which children might be certified as adults under this process. Moreover, this statute makes no reference to the possibility of the death penalty. The prospect of capital punishment of such children exists because of the generally-applicable statute for punishment of first degree murder. 21 Okla. Stat. §§ 701.7, 701.9, 701.10, 701.11.

- A. This case presents an important, unresolved issue respecting the meaning of the constitutional prohibition of cruel and unusual punishments. This issue was previously examined, but not decided in Eddings v. Oklahoma.

In Eddings v. Oklahoma, 455 U.S. 104 (1982) cert. granted, 450 U.S. 1040 (1981) this Court previously agreed to decide "[w]hether the infliction of the death penalty on a child who was sixteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States." Brief for Petitioner at i, Eddings v. Oklahoma. Eventually, however, the Court upheld Eddings' claim because the trial court had not given adequate consideration to all mitigating evidence.

The majority in Eddings held that the "chronological age of a minor is itself a relevant mitigating factor of great weight." 455 U.S. at 116. However, as a concurring opinion of Justice

O'Connor and a dissenting opinion of Chief Justice Burger made clear, the majority did not "decid[e] the issue of whether the Constitution permits imposition of the death penalty on an individual who committed a murder at age 16." Id. at 119 (O'Connor, J., concurring).

The issue remains unresolved, but it is still as important as when this Court first considered the problem in its review of Eddings.

- B. Judicial review of juvenile death sentences is faithful to the original purposes of the constitutional prohibition against cruel and unusual punishment.

Although it is true that "specific provisions of the Constitution, no less than [general provisions such as] 'due process' lend themselves as readily to 'personal' interpretations. . . ." Griswold v. Connecticut, 381 U.S. 479 (1965) (Harlan, J., concurring), it is also true that a few constitutional provisions seem explicitly to mandate an on-going judicial search for evolving principles of humanity and decency. The Eighth Amendment is one such provision. J. Ely, Democracy and Distrust 13-14 (1980).

The Framers adopted the provision over objections that it was "too indefinite," apparently because "the clause expressed a great deal of humanity," 7 Annals of Cong 754 (1789) (remarks of Representatives Smith and Livermore), discussed in Weems v. United States, 217 U.S. 349, 369 (1910) and Furman v. Georgia, 408 U.S. 238, 243-45, 262-263 (1972). Moreover, like other declarations of basic rights, the Eighth Amendment required judicial interpretation and judicial protection. When the Bill of Rights was incorporated into the Constitution, it was expected that "independent tribunals of justice [would] consider themselves in a peculiar manner the guardians of those rights." Address of James Madison to the U.S. House of Representatives (June 8, 1789), reprinted in 5 The Writings of James Madison 385 (G. Hunt ed. 1904). It was hoped that the courts would "naturally be led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration

of rights." Id.

In Weems v. United States, 217 U.S. 349 (1910), the Court adopted a view of the Eighth Amendment that is faithful to these original purposes of the express prohibition. As the Court invalidated a sentence prescribed by a legislature for a particular offense, it recognized that:

"The clause of the Constitution . . . may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."

217 U.S. at 378. The unalterable reality is that if federal courts refuse to consider the nation's traditions of decency when examining juvenile death sentences in light of the Eighth Amendment's prohibition of cruel and unusual punishment, "the words of the Constitution [have] become little more than good advice," Trop v. Dulles, 356 U.S. 86, 104 (1958), despite the expressed hopes of the Framers of the Eighth Amendment.

C. States should not execute individuals for crimes committed while they are still children.

The meaning of the Eighth Amendment "must be drawn from the evolving standards of decency that mark the progress of an evolving society." Trop v. Dulles, 356 U.S. 86, 101 (1958). The "basic policy reflected in [the Eighth Amendment] is firmly established in the Anglo-American traditions of criminal justice." Id. at 100-101. It appears settled that these traditions allow capital punishment in many cases. Id. at 99-100; Gregg v. Georgia, 428 U.S. 153 (1976). It appears equally obvious that imposition of the death penalty in certain cases may offend the nation's jurisprudential traditions. Coker v. Georgia, 433 U.S. 595 (1977) (death penalty is grossly disproportionate and excessive punishment for the crime of rape).

Among the cases in which the death penalty is cruel and unusual is this case in which a minor has been convicted and sentenced to die for a crime committed at age fifteen. Killing minors for crimes committed while still children offends fundamental standards of decency and humanity.

1. The death penalty for a crime committed by a child of fifteen is punishment that offends American traditions of justice.

Juvenile executions have always been rare. In part, this fact reflects the traditions of Anglo-American law, which require that children be treated differently. As Justice Frankfurter aptly noted, "[c]hildren have a very special place in life which the law should reflect." May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Manifestation of this different treatment are limitations on youths' right to vote, contract, sue or be sued, dispose of property by will, marry, accept employment, purchase liquor, drive vehicles. F. Zimring, The Changing Legal World of Adolescence (1982). Ironically, juveniles certified to stand before the criminal justice system as if they were adults are prohibited from serving on a jury, such as the one that decides their fate.

The development of a juvenile justice system was a manifest rejection of harsh, adult punishment for the unlawful acts of children. In Re Gault, 387 U.S. 1, 15-16 (1967). However, the perception that youths should not be subjected to the harshest punishments was an informal premise of Anglo-American criminal justice well before the development of separate juvenile justice systems. Younger offenders may not have had de jure benefit of more lenient punishments, but the young did receive de facto benefits, such as shorter sentences, special incarceration facilities, community-based sanctions or outright commutation of criminal sentences. See, e.g., Fox, "Juvenile Justice Reform: A Historical Perspective," 22 Stan. L. Rev. 1187 (1970).

Beginning with the 1890's and through the 1920s, the total number of juvenile executions each decade ranged from twenty to twenty-seven, comprising about 1.6 to 2.3% of all executions. The number of juvenile executions rose in the 1930s, but the percentage of juvenile executions was still only about 2.5% of the total. In the nineteen forties, the percentage of juvenile executions peaked, but then declined precipitously. Only sixteen juveniles were executed in the 1950s. In 1964, juvenile executions ended temporarily with the death of a seventeen year

old who had been convicted of rape. Echols v. State, 370 S.W.2d 892 (Tex. Crim. App. 1963). Since the resumption of executions in the late nineteen-seventies, only three juveniles have been executed. See, e.g., Streih, "The Eighth Amendment and Capital Punishment of Juveniles," 34 Cleve. St. L. Rev. 363 (1986).

Jury sentencing patterns in juvenile death penalty cases further show the harshness of capital punishment in such cases. In the years 1982 to the present, approximately 280 death sentences per year were imposed by juries throughout the United States. Only 1% to 2% of these death sentences were imposed on individuals for crimes committed while under the age of eighteen. Eleven such sentences were imposed in 1982, ten in 1983, six in 1984, three in 1985 and six thus far in 1986. Id. Jury sentencing practices for fifteen-year-old offenders is even more striking. Of the approximately 1,400 death sentences imposed from 1982 through 1986, only five (0.3%) have been for crimes committed when the convicted individual was age fifteen. Id.

Currently, fourteen states expressly exclude youths under age sixteen, seventeen or eighteen from death penalty statutes.¹ Some of these states have used the death penalty for years, but never allowed execution of juveniles below a certain age. For example, Texas, has always maintained a death penalty, but has excluded juveniles under the age of seventeen from the death penalty since at least 1897. Texas Penal Code Ann. §8.07(d) (Vernon Supp. 1982). Moreover, a clear trend seems to be emerging. In the past five years, six states (Colorado, Nebraska, New Jersey, Ohio, Oregon and Tennessee) have enacted a minimum age of eighteen in their death penalty statutes. Other

1. California (Cal. Penal Code §190.5; (West Supp. 1985)); Colorado (Col. Rev. Stat. §16-10-103 (1985)); Connecticut (Conn. Gen. Stat. Ann. §53a-46a(g)(1) (West Supp. 1985)); Georgia (Ga. Code Ann. § 17-9-3 (1982)); Illinois (Ill. Ann. Stat. ch. 38, § 9-1(b) (Smith-Hurd Supp.)); Nebraska (Nebr. Rev. Stat. §28-105.01 (1982)); Nevada (Nev. Rev. Stat. §176.025 (1979)); New Hampshire (N.H. Rev. Stat. Ann. §630:5(II)(b)(5) (Supp. 1981)); New Jersey (N.J. Stat. Ann. §2C: 11-3f (West 1986)); New Mexico (N.M. Stat. Ann. §31-18-14 (1979)); Ohio (Ohio Rev. Code Ann. §2929.02(E) (Page 1984)); Oregon (Ore. Rev. Stat. §161.615 (1985)); Tennessee (Tenn. Code Ann. §37-1-134(1) (1984)); and Texas (Tex. Penal Code Ann. §8.07(d) (Vernon Supp. 1985)).

states, such as Georgia and Washington, are currently considering similar measures. Thirteen other states establish a minimum age limit through either juvenile court waiver statutes or statutes giving concurrent or exclusive jurisdiction to criminal courts for capital murders committed by offenders of a certain age or older.²

Six other states explicitly mandate chronological youth as a statutory mitigating circumstance to be considered in the sentencing of an offender.³

Only three states-- Delaware, South Dakota and Oklahoma -- continue to have no minimum age for the death penalty and no express provisions that youth be regarded as a mitigating factor in the death sentencing decision.⁴ (Of course, in Eddings v. Oklahoma, this Court found that age must be so considered.) Of these three, only in Oklahoma is any person under a death sentence for crimes committed under the age of eighteen-- the defendant in this case.

2. Capital punishment of juveniles is arbitrary, freakish punishment that makes no measurable contribution to the goals of punishment.

Since Oklahoma has, in essence, decided not to establish any minimum age for juvenile executions-- or has made no decision at all, except to allow case-by-case decision-making -- the rationality and utility of executing a minor for an act committed

2. Alabama (Ala. Code §12-15-34(a) (1977)); Arkansas (Ark. Stat. Ann. §41-61712 (Supp. 1985)); Idaho (Idaho Code §16-1806A(1) (Supp. 1984)); Indiana (Ind. Code Ann. §31-6-2-4(c) (Burns Supp. 1982)); Kentucky (Ky. Rev. Stat. Ann. §20Code §16-1806A(1) (Supp. 1984)); Indiana (Ind. Code Ann. §31-6-2-4(c) (Burns Supp. 1982)); Kentucky (Ky. Rev. Stat. Ann. §208E.070(2) (Baldwin 1980)); Louisiana (La. Rev. Stat. Ann. §13:1570(A)(5) (1983)); Mississippi (Mis. Code Ann. §43-21-151 (1985)); Missouri (Mo. Ann. Stat. §211.071 (Vernon Supp. 1985)); Montana (Mont. Code Ann. §31-5-206 (1985)); North Carolina (N.C. Gen. Stat. §7A-608 (1981)); Pennsylvania (Pa. Code Stat. §6355(a)(1) (1985)); Utah (Utah Code Ann. §78-3a-25(1)(Supp. 1983)); and Virginia (Va. Code Ann. §16.1-269(A) (1982)).

3. Arizona (Ariz. Rev. Stat. Ann. §13-703(G)(5) (Supp. 1985)); Florida (Fla. Stat. Ann. §921.141(6)(g) (West Supp. 1984)); Maryland (Md. Code art. 27, §413(g)(5) (Supp. 1985)); South Carolina (S.C. Code Ann. §16-3-20(c)(b)(7) (1985)); Washington (Wash. Rev. Code §10.95.070 (7) (Supp. 1986)); and Wyoming (Wyo. Stat. §6-2-102(j)(vii) (Repl. 1983)).

4. 11 Del. Code Ann. § 4209(c) (Repl. 1979); 21 Okla. Stat. §701.01 (West 1983); S.D. Codified Laws Ann. 23A-27A-1 (Supp. 1984).

while still a child is impossible to discern.

The total number of juvenile death sentences and executions throughout the United States is miniscule. Also, the manner in which those few victims of juvenile capital punishment are selected for the harshest adult punishment appears to be almost totally random. Approximately 6,000 juveniles have been arrested between 1982 and 1986 for murder and non-negligent homicide. Federal Bureau of Investigation, Uniform Crime Reports 1982-1986. Of those 6,000 cases, only thirty-six (0.6%) have resulted in the death sentence. Even if only one-fourth of those arrests (1,500) were for crimes which could have been prosecuted as capital cases, the thirty-six death sentences still constitute only 2% of the resulting penalties imposed by the legal system.

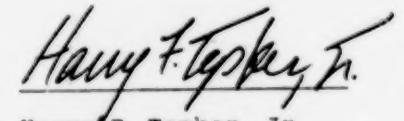
To paraphrase Justice Stewart, death sentences for juveniles are cruel and unusual in the same way that being struck by lightning is cruel and unusual. Furman v. Georgia, 408 U.S. at 309 (Stewart, J. concurring). Those few juveniles selected for the death penalty are only a very small portion of all juveniles who commit criminal homicides. The actual execution of such juveniles is so rare as to be freakish and irrational, serving no reasonable purposes of retribution or deterrence.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this petition for a writ of certiorari be granted.

Petitioner respectfully requests that this Court vacate the death sentence in this case and grant such other relief as it deems appropriate. In the alternative, petitioner requests that this Court remand this case for resentencing after a fair, full consideration of all mitigating circumstances without the prejudicial effects of inflammatory evidence.

Respectfully submitted,



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APPENDIX

1. Thompson v. State, 724 P.2d 780 (Okla.Cr. 1986) A-2
2. Pertinent Oklahoma Statutes Respecting Definition of "Child" and Trial of Children As Adults A-10
 - 10 Okla. Stat. §1101
 - 10 Okla. Stat. §1104.2
 - 10 Okla. Stat. §1112
3. Pertinent Oklahoma Statutes Respecting First Degree Murder and Death Penalty A-12
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780 Okl.

724 PACIFIC REPORTER, 2d SERIES

William Wayne THOMPSON, Appellant,
 v.
 STATE of Oklahoma, Appellee.
 No. F-84-29.
 Court of Criminal Appeals of Oklahoma.
 Aug. 29, 1986.
 Rehearing Denied Sept. 24, 1986.

Defendant was convicted of first-degree murder and sentenced to death, by jury verdict, in the District Court of Grady County, James R. Winchester, J. Defendant appealed. The Court of Criminal Appeals, Breti, J., held that: (1) it was not error to admit videotape depicting recovery of victim's body from river; (2) prosecutor's injection of criminal record of distant relative of witness was error but not prejudicial; (3) death sentence for murderer who was 15 at time of murder did not constitute cruel and/or unusual punishment; and (4)

facts amply supported conclusion that murder was heinous, atrocious, or cruel.

Affirmed.

Bussey, J., specially concurred and filed opinion.

Parks, P.J., specially concurred and filed opinion.

1. Criminal Law §1037.1(2)

Prosecutor's comments, which were made during murder prosecution voir dire and which may have set the stage for long line of requests for sympathy for victim, did not constitute fundamental error.

2. Jury §33(2.1)

Exclusion of potential jurors simply because they were opposed to capital punishment did not deny murder defendant trial by fair and impartial cross section of community.

3. Criminal Law §438(8)

Videotape depicting recovery of victim's body from river was admissible in murder prosecution to show condition and location of body at time it was recovered; videotape was not gruesome and no close-up views of body were shown to jury.

4. Criminal Law §438(6)

Photograph of victim showing chain wrapped around victim's legs and concrete block was admissible in murder prosecution to show condition of body at time it was recovered; picture was not particularly gruesome.

5. Criminal Law §438(7), 1169.1(10)

Admission of two gruesome color photographs in murder prosecution was error, but it was not reversible error in view of strong evidence against defendant.

6. Criminal Law §723(4)

Prosecutor's comments on defendant's propensity to commit acts of violence in the future were not comments designed to arouse societal alarm and were fair comment on the evidence within permissible range of closing arguments, in view of fact that defendant's propensity to commit acts

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of violence in the future was one of the aggravating circumstances.

7. Criminal Law §1170½(1)

Witnesses §345(1)

Prosecutor's injection of criminal record of distant relative of witness had no place in murder proceeding, but was not prejudicial and did not warrant modification of sentence.

8. Criminal Law §722(2)

Prosecutor's characterization of 16-year-old murder defendant as being emotionally older than his chronological age was proper in view of the evidence.

9. Criminal Law §1213.8(8)

Sentencing defendant, who was 15-at time of the offense, to death did not constitute cruel and/or unusual punishment; defendant had been certified to stand trial as adult. U.S.C.A. Const.Amend. 8; Const. Art. 2, § 9.

10. Homicide §354

Failure of prosecutor to present evidence of specific aggravating circumstances at preliminary hearing in murder prosecution did not deprive trial court of jurisdiction to sentence defendant to death.

11. Criminal Law §667(1)

Cross-examination of seven-year-old son of victim in murder prosecution was not improperly restricted by trial court, even though trial court instructed defense counsel not to ask certain types of questions; defense counsel neither indicated he wished to ask those questions nor objected to the limitation.

12. Criminal Law §824(1)

Trial court was not required to instruct jury, sua sponte, that court would impose life sentence if jury could not reach verdict within reasonable time.

13. Homicide §354

Evaluation of heinous-atrocious-cruel aggravating circumstances in prosecution of 16-year-old for murder of person who had his leg broken, his throat and chest slashed, and who knew for some time that his attackers ultimately were going to kill

him, was not arbitrary, and death penalty was constitutional. U.S.C.A. Const. Amends. 8, 14.

14. Criminal Law §1042

Defendant, who failed to object at trial to testimony of clinical psychologist concerning probability that defendant would commit criminal acts of violence that would constitute continuing threat to society, on theory that such evidence could not be used as defendant was not apprised of his rights and did not waive them, forfeited argument on appeal.

15. Homicide §343

Error, if any, in failing to afford murder defendant psychiatric witness to counter State's psychiatric witness, was harmless and did not require modification or reversal, in view of fact that jury did not find existence of aggravating circumstances that State intended to prove by psychiatric witness. 20 O.S.1981, § 3001.1.

16. Homicide §354

Evidence that murder victim was abducted from his home, severely beaten by four men, shot twice, and had his leg broken and his throat and chest slashed with knife, amply supported conclusion that murder was heinous, atrocious, or cruel for purposes of death sentence.

17. Homicide §354

Jury's imposition of death sentence against defendant who personally kicked victim in the head, shot victim in the head, slit victim's throat, and dragged victim's weighted body into the river was based on overwhelming evidence of defendant's culpability for truly heinous crime, and not imposed under influence of passion, prejudice, or any other arbitrary factor.

An Appeal from the District Court of Grady County; James R. Winchester, District Judge.

William Wayne Thompson, appellant, was convicted of First Degree Murder, in the District Court of Grady County, Case

No. CRF-83-45, was sentenced to death, and he appeals. AFFIRMED.

E. Alvin Schay, Appellate Public Defender, Norman, for appellant.

Michael C. Turpen, Atty. Gen., William H. Luker, Asst. Atty. Gen., Oklahoma City, for appellee.

OPINION

BRETT, Judge:

Having been certified to stand trial as an adult, William Wayne Thompson was tried for First Degree Murder [21 O.S.1981, § 701.7(A)] in Grady County District Court, Case No. CRF-83-45. The jury found him guilty as charged and fixed his punishment at death. Judgment and sentence were rendered accordingly and appellant appeals. We affirm.

The evidence at trial showed that appellant, his brother Anthony James Mann, Bobby Glass, and Richard Jones murdered Charles Keene, the appellant's former brother-in-law, in the early morning hours of January 23, 1983. Keene was shot once in the head and once in the chest, and his throat, chest, and abdomen had been cut. He also had multiple bruises and abrasions, especially about his face and head, and his left leg was broken. Keene's body was chained to a concrete block and thrown into the Washita River, where it remained undiscovered until February 18, 1983. The four co-defendants were tried separately. Each received the death penalty.

[1] Appellant raises three assignments of error that pertain to the guilt stage of the trial. He first argues that the prosecutor "set the stage for a long line of requests for sympathy for the victim during voir dire." As trial counsel failed to object to any of these statements or questions, the alleged error has not been properly preserved for review. See *Nuckols v. State*, 690 P.2d 463 (Okl.Cr.1984). We conclude from our examination of the record that there was no fundamental error.

[2] Appellant relies on *Grigsby v. Mabry*, 569 F.Supp. 1273 (E.D.Ark.1983) for

the proposition that excluding potential jurors simply because they are opposed to capital punishment denies the accused of a trial by a fair and impartial cross-section of the community. Since this appeal was filed, the *Grigsby* case has been affirmed by the circuit court, 758 F.2d 226 (8th Cir. 1985), but reversed by the Supreme Court *sub nom. Lockhart v. McCree*, — U.S. —, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). The United States Supreme Court rejected this proposition as did this Court in *Foster v. State*, 714 P.2d 1031 (Okl.Cr.1986). Moreover, this argument was not raised at trial and cannot, therefore, be raised on appeal. See *Nuckols*, 690 P.2d at 469.

[3,4] Appellant's final assignment of error that would affect the conviction is that the trial court committed reversible error by admitting into evidence a video tape depicting the recovery of the victim's body from the river and three color photographs of the victim. Trial counsel objected to the exhibits on the basis that all were gruesome and more prejudicial than useful, that they only emphasized and re-emphasized matters that were covered less graphically by the medical examiner. The trial court found that the probative value of the photographs and video tape outweighed their prejudicial effect and that they were relevant to show the condition and location of the body at the time it was recovered.

We have viewed the video tape and did not find it to be gruesome. No close-up views of the body were shown to the jury. Admitting the tape into evidence was not error. Nor was it error to admit the photograph of the victim showing the chain wrapped around his legs and a concrete block as that picture was not particularly gruesome.

[5] The other two color photographs, however, were gruesome. Admitting them into evidence served no purpose other than to inflame the jury. We do not understand why an experienced prosecutor would risk reversal of the whole case by introducing such ghastly, color photographs with so little probative value. We fail to see how

they could possibly assist the jury in the determination of defendant's guilt. The trial court's admission of these two photographs was error. See *Ozendine v. State*, 335 P.2d 940 (Okla. Cr. 1958).

Nevertheless, the evidence against the appellant was so strong that the error does not require reversal. See *Newbury v. State*, 695 P.2d 531 (Okla. Cr. 1985). Two witnesses—Donetta Bradford, appellant's girlfriend, and Charlesetta Garcia, Bobby Glass' girlfriend—testified that appellant told them that he had shot Charles in the head and cut his throat. Charlotte Mann, Anthony Mann's former wife, heard appellant tell his mother that Charles Keene was dead, that he had killed him, and that Vicki—the victim's ex-wife and the appellant's sister—did not have to worry about him anymore.

When appellant and the other co-defendants left their house on the evening of the murder, appellant told Bradford, "We're going to kill Charles." When they returned several hours later, appellant was wet from the chest down, his nose was bleeding, and he no longer had on the cap he had been wearing when he left.

Myrtle and Malcolm "Possum" Brown, who lived near the Washita River, returned from a vacation and retired early the night Charles Keene was killed. They were awakened by a gunshot and barking dogs. A man pounded on the door and shouted, "Possum, let me in. They're going to kill me." The Browns looked outside and saw three or four men beating another man. They heard one of the men say, "This is for the way you treated our sister." Mr. Brown telephoned the sheriff, but the men left soon after they realized the Browns were home and witnessing the fray. It was too dark for the Browns to identify any of the men.

The O.S.B.I. analyzed a stain on the Browns' front porch carpet and discovered it was caused by human blood group A, the same blood type of the victim. An expended .45 caliber Winchester Western cartridge case was found in the Browns' front yard; the same type of ammunition was

used to kill Charles Keene. In the Browns' dogpen, fabric was found that had the same type design as the cap appellant had worn the night of the homicide.

The above recitation of facts is by no means exhaustive, but is demonstrative of how strong the evidence against appellant was. In view of this evidence, we cannot say that the two color photographs, although gruesome, affected the jury's determination that appellant was guilty as charged.

Finding no errors which would affect the conviction of first degree murder, we affirm that judgment. We turn now to a review of the sentencing.

Appellant alleges four categories of prosecutorial misconduct: comments requesting sympathy for the victim, comments arousing societal alarm, injecting matters not in evidence through improper cross-examination, and unfair characterization of the appellant. None of the statements falling in the first category were preserved for review as trial counsel made no objection. Having reviewed the record for fundamental error, we conclude that none of the comments warrant reversal or modification. See *Nuckols*, 690 P.2d at 471.

[6] The comments that appellant claims were designed to arouse societal alarm were in fact, as the trial judge ruled them to be, comments on the appellant's propensity to commit acts of violence in the future. As that was one of the aggravating circumstances alleged and supported by evidence, we find the comments to be a fair comment on the evidence and within the permissible range of closing argument.

The alleged improper cross-examination was of character witnesses called by the defense. Most of the questions were proper under 12 O.S. 1981, § 2405, which states that "[i]nquiry is allowable on cross-examination into relevant specific instances of conduct."

[7] One question, however, was clearly improper. The prosecutor asked one defense witness whether he was related to

Cecil Leroy Cloud. When the witness responded that Mr. Cloud was his father's step-brother, the prosecutor said, "That's the same Cecil Leroy Cloud that we sent to the pen for shooting with intent to kill, correct." We agree with appellate counsel that "[i]njection of the criminal record of a distant relative of a witness has no place in a criminal proceeding, and could not be termed anything other than an intentional effort at hurting the case of the accused." Notwithstanding, no objection was made at trial and we believe that such an obviously "cheap shot" discredited the prosecutor more than the witness. The error was not prejudicial and does not warrant modification of the sentence.

[8] Appellant further complains that the prosecutor consistently sought to characterize him as being emotionally older than his chronological age. Defense counsel stressed appellant's youth as a mitigating factor, arguing that he should not be given the death penalty because he was young enough to change and improve himself. Defense counsel also tried to argue that appellant was a "normal little boy ... just like other little boys." The prosecutor's arguments to the contrary were proper inferences from the evidence. The evidence did not show William Wayne Thompson to be a typical sixteen-year-old, and the State properly argued that fact.

[9] The appellant's next proposition is that the execution of William Wayne Thompson, who was fifteen at the time of the offense, would constitute cruel and/or unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and under Article Two, Section Nine of the Oklahoma Constitution. The same arguments now made by appellant were made by appellate counsel in *Eddings v. State*, 616 P.2d 1159 (Okla. Cr. 1980). This Court, unanimously rejecting the arguments, found that imposition of the death penalty on a minor certified to stand trial as an adult constitutes neither cruel nor unusual punishment. *Id.* at 1166-67.

The United States Supreme Court granted certiorari on the issue, *Eddings v. Oklahoma*, 450 U.S. 1040, 101 S.Ct. 1756, 68 L.Ed.2d 237 (1981), but then decided the case on another ground. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Upon reconsideration of the issue, we reaffirm our previous holding that once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult.

[10] Next appellant argues that failure of the prosecutor to present evidence of specific aggravating circumstances at the preliminary hearing deprived the trial court of jurisdiction to sentence him to death. This Court has repeatedly rejected this argument. See, e.g., *Nuckols*, 690 P.2d at 469-70; *Brewer v. State*, 650 P.2d 54 (Okla. Cr. 1983). As a subproposition of error the appellant claims that the State failed to inform him of the evidence in aggravation it intended to present. The record, however, indicates that notice was given three months before trial. This assignment of error is totally without merit.

In the next assignment of error, appellant urges this Court to overrule the portion of *Chaney v. State*, 612 P.2d 269 (Okla. Cr. 1980), *rev'd in part on other grounds sub nom. Chaney v. Brown*, 730 P.2d 1334 (10th Cir. 1984), that held that the instructions given provided the jury sufficient guidance to prevent an arbitrary or discriminatory application of the death penalty. See *id.* at 279-80. Substantially the same instructions were given in the case at bar, and we find them to be adequate for constitutional purposes. Furthermore, the instructions were not objected to at trial.

[11] Appellant argues next that examination of one of its witnesses—the seven-year-old son of the victim—was improperly restricted by the court. The record does not bear out this allegation. The transcript of the proceedings conducted in chambers shows exactly what questions defense counsel wanted to ask. The trial court did instruct trial counsel not to ask other types of questions, but defense counsel neither

indicated that he wished to do so nor objected to the limitation.

[12] That the trial court erred in failing to instruct the jury, *sua sponte*, that he would impose a life sentence if they could not reach a verdict within a reasonable time is appellant's next contention. This Court has held that it is not even error to refuse to give such an instruction if it is requested. *Brogie v. State*, 695 P.2d 538 (Okla. Cr. 1985). The trial court did not err.

[13] The appellant argues that the Eighth and Fourteenth Amendments to the United States Constitution do not permit the imposition of the death penalty because this Court has been evaluating the heinous-atrocious-cruel aggravating circumstance in an arbitrary manner. The death penalty convictions affirmed by this Court in which this aggravating circumstance has been found to exist have consistently passed constitutional challenge. See *Cooks v. State*, 699 P.2d 653 (Okla. Cr.), *cert. denied*, — U.S. —, 106 S.Ct. 268, 88 L.Ed.2d 275 (1985); *Cartwright v. State*, 695 P.2d 548 (Okla. Cr.), *cert. denied*, — U.S. —, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985); *Stout v. State*, 693 P.2d 617 (Okla. Cr. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 3489, 87 L.Ed.2d 623 (1985); *Nuckols v. State*, 690 P.2d 463 (Okla. Cr. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985); *Robison v. State*, 677 P.2d 1080 (Okla. Cr.), *cert. denied*, 467 U.S. 1246, 104 S.Ct. 3524, 82 L.Ed.2d 831 (1984); *Davis v. State*, 665 P.2d 1186 (Okla. Cr.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 203, 78 L.Ed.2d 177 (1983); *Jones v. State*, 648 P.2d 1251 (Okla. Cr. 1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 799, 74 L.Ed.2d 1002 (1983). Furthermore, the manner in which the murder was accomplished in this case was obviously heinous, atrocious or cruel. Before dying, the victim was severely beaten, had his leg broken, his throat and chest slashed, and

1. The Supreme Court agreed with the Court of Appeals' reasons, to wit: that the State did not timely raise this argument; that objecting would have been a futile act under Texas law; and that

knew for some time that his attackers ultimately were going to kill him.

[14] Dr. Helen Kline, a clinical psychologist and director of the psychology department at Central State Hospital testified at the sentencing stage of the trial. Her testimony was used solely to prove the existence of a probability that the appellant would commit criminal acts of violence that would constitute a continuing threat to society.

Appellant argues that his Fifth and Sixth Amendment rights were violated because he was not warned of his right to remain silent during the two interviews with Dr. Kline, or that anything he said could be used against him. The original record was silent in this regard until appellant filed an affidavit dated November 21, 1985, stating he was not so warned. The State filed an affidavit dated April 1, 1986, saying she did warn him.

The United States Supreme Court has held that a criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. When a defendant is faced while in custody with a court-ordered psychiatric inquiry, the State may use his statements at the penalty phase only if the defendant was apprised of his rights and knowingly decided to waive them. *Estelle v. Smith*, 451 U.S. 454, 468-69, 101 S.Ct. 1866, 1876, 68 L.Ed.2d 359 (1981).

Appellant claims that his failure to object when Dr. Kline testified does not constitute waiver of this claim because the Supreme Court did not require a timely, specific trial objection in *Smith*. The Supreme Court, however, gave its reasons for rejecting the State's waiver argument,¹ and none of

defendant Smith's objection was essentially surprise. *Smith*, 451 U.S. at 468, n. 12, 101 S.Ct. at 1876 n. 12.

those reasons are applicable to the case at bar. Thus, we conclude that regardless of whether appellant was warned, he has forfeited this argument by failing to assert the claim at a time when the trial judge could have prevented any error.

[15] Finally, appellant, relying on *Ake v. Oklahoma*, — U.S. —, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), argues that because the State utilized psychiatric testimony, it was error not to afford appellant a psychiatric witness to counter the State's evidence. Appellant does not allege that funds for a psychiatric witness were requested.

Even if a psychiatric witness was required by *Ake*, the *Ake* Court's reason for its ruling was to prevent the State from having a strategic advantage over a defendant that would create a risk of error in the proceeding absent a defense witness to counter-balance the State's expert testimony. In the case at bar, any advantage the State may have had was fruitless since the jury did not find the existence of the aggravating circumstance that the State intended to prove by Dr. Kline's testimony. Error, if any, was harmless and not cause for modification or reversal. See 20 O.S. 1981 § 3001.1.

Having addressed all the errors alleged by the appellant, this Court now turns to a determination of whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports the jury's finding that the murder was especially heinous, atrocious, or cruel. 21 O.S. Supp. 1985, § 701.13.

[16] The victim herein was abducted from his home, severely beaten by four men, shot twice, and had his leg broken and his throat and chest slashed with a knife. When he attempted to escape and

had a chance to call out for help, he was thrown into the trunk of a car. These facts amply support the conclusion that the murder was heinous, atrocious, or cruel.

[17] The record discloses nothing to indicate that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Although appellant was the youngest of the four assailants, his participation was hardly minimal. The evidence showed that he personally kicked the victim in the head, shot the victim in the head, slit the victim's throat, and dragged the victim's weighted body into the river. The jury's decision clearly was based on the overwhelming evidence of appellant's culpability for this truly heinous crime.

The judgment and sentence are hereby **AFFIRMED**.

PARKS, P.J., and BUSSEY, J., specially concur.

PARKS, Presiding Judge, specially concurring:

I agree with all that my brother Judge Brett has stated in this opinion. However, I write separately to consider whether the sentence of death in this case "is excessive or disproportionate . . . , considering both the crime and defendant." This consideration is missing from the Court's opinion. 21 O.S. 1981, § 701.13(C). Although our Legislature has revised this statute somewhat in 1985 Okla. Sess. Laws, Ch. 265, now codified at 21 O.S. Supp. 1985, § 701.13, I believe application of this revision to cases pending on appeal at the time the law was enacted would render the new provision an *ex post facto* law. See *Green v. State*, 713 P.2d 1032, 1041 n. 4 (Okla. Cr. 1985). Nevertheless, I have personally compared the

THOMPSON v. STATE

Cite as 724 P.2d 780 (Okla. Cr. 1986)

Okla. 787

sentence imposed herein with those previous cases either affirmed¹ or modified² by this Court, and find the sentence to be proper.

BUSSEY, Judge, specially concurring.
Finding no error warranting reversal or modification, I agree that the judgment and sentence should be affirmed.

1. *Ross v. State*, 717 P.2d 117 (Okla. Cr. 1986); *Foster v. State*, 714 P.2d 1031 (Okla. Cr. 1986); *Green v. State*, 713 P.2d 1032 (Okla. Cr. 1986); *Liles v. State*, 702 P.2d 1025 (Okla. Cr. 1985); *Cooks v. State*, 699 P.2d 653 (Okla. Cr. 1985); *Banks v. State*, 201 P.2d 418 (Okla. Cr. 1985); *Cartwright v. State*, 695 P.2d 548 (Okla. Cr. 1985); *Brogie v. State*, 695 P.2d 538 (Okla. Cr. 1985); *Bowen v. State*, 715 P.2d 1093, 55 O.B.J. 2520 (Okla. Cr. 1984); *Stout v. State*, 693 P.2d 617 (Okla. Cr. 1984); and *Nuckols v. State*, 690 P.2d 463 (Okla. Cr. 1984); *Robison v. State*, 677 P.2d 1080 (Okla. Cr. 1984); *Dutton v. State*, 674 P.2d 1134 (Okla. Cr. 1984); *Stafford v. State*, 669 P.2d 285 (Okla. Cr. 1983); *Coleman v. State*, 668 P.2d 1126 (Okla. Cr. 1983); *Stafford v. State*, 665 P.2d 1205 (Okla. Cr. 1983); *Davis v. State*, 665 P.2d 1186 (Okla. Cr. 1983); *Ake v. State*, 663 P.2d 1 (Okla. Cr. 1983); *Parks v. State*, 651 P.2d 686 (Okla. Cr. 1982); *Jones v. State*, 648 P.2d 1251 (Okla. Cr. 1982);

1982); *Hays v. State*, 617 P.2d 223 (Okla. Cr. 1980); and *Chaney v. State*, 612 P.2d 269 (Okla. Cr. 1980), modified on other grounds, sub. nom., *Chaney v. Brown*, 730 F.2d 1334 (10th Cir. 1984).

2. *Green v. State*, 713 P.2d 1032 (Okla. Cr. 1985); *Eddings v. State*, 616 P.2d 1159 (Okla. Cr. 1980); as modified, 688 P.2d 342 (Okla. Cr. 1984); *Morgan v. State*, No. F-79-487 (Okla. Cr. Nov. 14, 1983) (Unpublished); *Johnson v. State*, 665 P.2d 815 (Okla. Cr. 1982); *Gledwell v. State*, 663 P.2d 738 (Okla. Cr. 1983); *Jones v. State*, 660 P.2d 634 (Okla. Cr. 1983); *Driskell v. State*, 659 P.2d 343 (Okla. Cr. 1983); *Bourwell v. State*, 659 P.2d 322 (Okla. Cr. 1983); *Munn v. State*, 658 P.2d 482 (Okla. Cr. 1983); *Odum v. State*, 651 P.2d 703 (Okla. Cr. 1982); *Burrows v. State*, 640 P.2d 532 (Okla. Cr. 1982); *Franks v. State*, 636 P.2d 361 (Okla. Cr. 1981); *Irvin v. State*, 617 P.2d 588 (Okla. Cr. 1980).

§ 1101. Definitions

When used in this title, unless the context otherwise requires:

1. "Child" means any person under eighteen (18) years of age, except for any person sixteen (16) or seventeen (17) years of age who is charged with murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the first degree, use of a firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree, or nonconsensual sodomy.

§ 1104.2. Persons 16 or 17 years of age to be considered as adult for committing certain offenses—Warrants—Certification as child

A. Any person sixteen (16) or seventeen (17) years of age who is charged with murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the second degree, use of firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree, or nonconsensual sodomy, shall be considered as an adult. Upon the arrest and detention, such sixteen- or seventeen-year-old accused shall have all the statutory and constitutional rights and protections of an adult accused of a crime, but shall be detained in a jail cell or ward entirely separate from prisoners who are eighteen (18) years of age or over.

B. Upon the filing of an information against such accused person, a warrant shall be issued which shall set forth the rights of the accused person, and the rights of the parents, guardian or next friend of the accused person to be present at the preliminary hearing, to have an attorney present and to make application for certification of such accused person as a child to the juvenile division of the district court. The warrant shall be personally served together with a certified copy of the information on the accused person and on the parents, guardian or next friend of the accused person.

C. The accused person shall file a motion for certification as a child before the start of the criminal preliminary hearing. Upon the filing of such motion, the complete juvenile record of the accused shall be made available to the district attorney and the accused person.

At the conclusion of the state's case at the criminal preliminary hearing, the accused person may offer evidence to support the motion for certification as a child.

The court shall rule on the certification motion of the accused person before ruling on whether to bind the accused over for trial. When ruling on the certification motion of the accused person, the court shall give consideration to the following guidelines, listed in order of importance:

1. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
2. Whether the offense was against persons or property, greater weight being given for retaining the accused person within the adult criminal system for offenses against persons, especially if personal injury resulted;
3. The record and past history of the accused person, including previous contacts with law enforcement agencies and juvenile or criminal courts, prior periods of probation and commitments to juvenile institutions; and
4. The prospects for adequate protection of the public if the accused person is processed through the juvenile system.

The court, in its decision on the certification motion of the accused person, need not detail responses to each of the above considerations, but shall state that the court has considered each of the guidelines in reaching its decision.

D. Upon completion of the criminal preliminary hearing, if the accused person is certified as a child to the juvenile division of the district court, then all adult court records relative to the accused person and this charge shall be expunged and any mention of the accused person shall be removed from public record.

PERTINENT OKLAHOMA STATUTES RESPECTING
FIRST DEGREE MURDER AND DEATH PENALTY

21 Okla. Stat.

§ 1112. Children charged with violating state statute or municipal ordinance—Juvenile proceedings—Felonies—Trial as adult—Matters considered—Bail

(a) Except as otherwise provided, a child who is charged with having violated any state statute or municipal ordinance other than those enumerated in Section 1104.2 of this title, shall not be tried in a criminal action but in a juvenile proceeding. If, during the pendency of a criminal or quasi-criminal charge against any person, it shall be ascertained that the person was a child at the time of committing the alleged offense, the district court or municipal court shall transfer the case, together with all the papers, documents and testimony connected therewith, to the juvenile division of the district court. The division making such transfer shall order the child to be taken forthwith to the place of detention designated by the juvenile division, to that division itself, or release such child to the custody of some suitable person to be brought before the juvenile division. However, nothing in this act shall be construed to prevent the exercise of concurrent jurisdiction by another division of the district court or by municipal courts in cases involving children wherein the child is charged with the violation of a state or municipal traffic law or ordinance.

(b) Except as otherwise provided by law, if a child is charged with delinquency as a result of an offense which would be a felony if committed by an adult, the court on its own motion or at the request of the district attorney shall conduct a preliminary hearing to determine whether or not there is prosecutive merit to the complaint. If the court finds that prosecutive merit exists, it shall continue the hearing for a sufficient period of time to conduct an

investigation and further hearing to determine the prospects for reasonable rehabilitation of the child if he should be found to have committed the alleged act or omission.

Consideration shall be given to:

1. The seriousness of the alleged offense to the community, and whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

2. Whether the offense was against persons or property, greater weight being given to offenses against persons especially if personal injury resulted;

3. The sophistication and maturity of the juvenile and his capability of distinguishing right from wrong as determined by consideration of his psychological evaluation, home, environmental situation, emotional attitude and pattern of living;

4. The record and previous history of the juvenile, including previous contacts with community agencies, law enforcement agencies, schools, juvenile courts and other jurisdictions, prior periods of probation or prior commitments to juvenile institutions;

5. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile if he is found to have committed the alleged offense, by the use of procedures and facilities currently available to the juvenile court; and

6. Whether the offense occurred while the juvenile was escaping or in an escape status from an institution for delinquent children.

After such investigation and hearing, the court may in its discretion proceed with the juvenile proceeding, or it shall state its reasons in writing and shall certify that such child shall be held accountable for its acts as if he were an adult and shall be held for proper criminal proceedings for the specific offense charged, by any other division of the court which would have trial jurisdiction of such offense if committed by an adult. The juvenile proceeding shall not be dismissed until the criminal proceeding has commenced and if no criminal proceeding has commenced within thirty (30) days of the date of such certification, unless stayed pending appeal, the court shall proceed with the juvenile proceeding and the certification shall lapse.

If not included in the original summons, notice of a hearing to consider whether a child should be certified for trial as an adult shall be given to all persons who are required to be served with a summons at the commencement of a juvenile proceeding, but publication in a newspaper when the address of a person is unknown is not required. The purpose of the hearing shall be clearly stated in the notice.

(c) Prior to the entry of any order of adjudication, any child in custody shall have the same right to be released upon bail as would an adult under the same circumstances.

(d) Any child who has been certified to stand trial as an adult pursuant to any certification procedure provided by law and is subsequently convicted of the alleged offense or against whom the imposition of judgment and sentencing has been deferred shall be tried as an adult in all subsequent criminal prosecutions, and shall not be subject to the jurisdiction of the juvenile court in any further proceedings.

(e) An order either certifying a person as a child pursuant to subsection (b) of this section or denying such certification shall be a final order, appealable when entered.

§ 701.7. Murder in the first degree

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

C. A person commits murder in the first degree when the death of a child results from the injuring, torturing, maiming or using of unreasonable force by said person upon the child pursuant to Section 843 of this title.

Amended by Laws 1982, c. 279, § 1, operative Oct. 1, 1982.
Approved May 21, 1982. Emergency.
Section 2 of Laws 1982, c. 279 provides for an operative date.

§ 701.9. Punishment for murder

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

B. A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life.

Laws 1976, 1st Ex.Sess., c. 1, § 3, eff. July 24, 1976.

§ 701.10. Sentencing proceeding—Murder in the first degree

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Laws 1976, 1st Ex.Sess., c. 1, § 4, eff. July 24, 1976.

§ 701.11. Instructions—Jury findings of aggravating circumstance

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life. Laws 1976, 1st Ex.Sess., c. 1, § 5, eff. July 24, 1976.

§ 701.12. Aggravating circumstances

Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

2. The defendant knowingly created a great risk of death to more than one person;

3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

4. The murder was especially heinous, atrocious, or cruel;

5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;

7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or

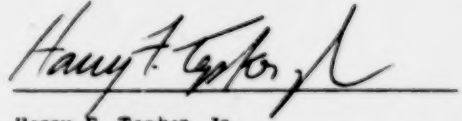
8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty. Laws 1976, 1st Ex.Sess., c. 1, § 6, eff. July 24, 1976. Laws 1981, c. 147, § 1, emerg. eff. May 8, 1981.

Section 4 of Laws 1981, c. 147 provides for severability.

CERTIFICATE OF SERVICE

86-6169

This is to certify that a copy of the foregoing Affidavit of William Wayne Thompson has been served by the United States mail, postage prepaid, on Michael C. Turpen, Attorney General of the State of Oklahoma, this 9th day of January, 1987.



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EDITOR'S NOTE

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Case No. 86-6169 (3)

Supreme Court, U.S.
FILED
JAN 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM WAYNE THOMPSON

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

January, 1987

(10)

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Case No. 86-6169

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM WAYNE THOMPSON

Petitioner,

vs.

THE STATE OF OKLAHOMA

Respondent.

On Petition for a Writ of Certiorari to the Court of
Criminal Appeals of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

The respondent State of Oklahoma, by and through Robert H. Henry, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Oklahoma Court of Criminal Appeals.

OPINION BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is reported at 720 P.2d 780 (Okla.Crim.App. 1986).

JURISDICTION

The Opinion of the Oklahoma Court of Criminal Appeals was entered on August 29, 1986. A Petition for Rehearing was denied on September 24, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Okla. Stat. Ann. tit. 21, § 701.7 (West 1983) provides in part:

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Okla. Stat. Ann. tit. 21, § 701.9 (West 1983) provides in part:

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

Okla. Stat. Ann. tit. 21, § 701.10 (West 1983) provides as follows:

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Okla. Stat. Ann. tit. 21, § 701.11 (West 1983) provides as follows:

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Okla. Stat. Ann. tit. 21, § 701.12 (West 1983) provides as follows:

Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
2. The defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or
7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Okla. Stat. Ann. tit. 21, § 701.13 (West 1983) provides as follows:

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the

transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by a clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

STATEMENT OF THE FACTS

This case concerns the abduction and murder of one Charles Keene in Grady County, Oklahoma, during the early morning hours of Sunday, January 23, 1983. The evidence shows that Anthony James Mann, Bobby Joe Glass, Richard Jones, and the Petitioner participated in this murder. The Petitioner is co-defendant

Anthony Mann's younger brother. The Petitioner was born on March 4, 1967, so at the time of the murder, he was fifteen years old, a month and a half before his sixteenth birthday (O. R. 479).

On the afternoon before the night of the murder, Anthony Mann and Danny Mann, the Petitioner's half brother, were involved in an altercation with Charles Keene at Keene's trailer home in Amber, Oklahoma. The quarrel arose from one of the many matrimonial squabbles between Charles Keene and Vickie Keene, the Petitioner's sister, and Charles Keene's former wife, who had continued to reside with Charles (Tr. 588-84, 51, 603-04, 610-12, 614, 717). After the fight Vickie Keene purchased some ammunition for a .45 caliber pistol that Anthony Mann had given to her, and decided to spend the night in her mother's home in Chickasha, where the Petitioner also resided (See Tr. 509, 594, 599, 631, 702-703). Before going to bed she placed the gun on a shelf at the Thompson residence (Tr. 601).

That evening Anthony Mann, Rickey Jones, Bobby Glass and the Petitioner were all present in the Thompson residence, and left there together (Tr. 631-32). Before leaving the Petitioner told his girl friend, Donetta Bradford, who was a guest in the home that night, that they were going to get Charles (Tr. 687-86).

At approximately 2:25 a.m. on the morning of January 23, 1983, an individual named Malcolm (Possum) Brown was awakened by a gunshot coming from his front porch. Then he heard someone knocking on his front door shouting, "Possum, open the door, let me in. They're going to kill me" (Tr. 469-70). Brown lived two miles north of Chickasha near the Washita River (Tr. 468, 492). He went to his front door and observed several men beating one man on this front porch. The men left taking their victim with them while Brown was calling the police (See. Tr. 473-77, 494-95, 498).

Several hours after leaving the Thompson residence the Petitioner and the others returned (Tr. 632, 686). The Petitioner was wet from the chest down, visibly shaken, and had a bloody nose (Tr. 686-87). He talked to Donetta Bradford and said,

"we killed him. I shot him in the head and cut his throat and threw him in the river." (Tr. 687-88). The Petitioner made several other damaging admissions that morning and during the days that followed (See Tr. 567-68, 575-76, 634-35). Anthony Mann and Bobby Glass also made admissions that morning (Tr. 512, 514, 569, 571, 618-19). They made further incriminating statements in the course of their subsequent efforts to check on the body and dispose of the gun (Tr. 424, 521-22, 522-25).

On February 18, 1983, the body was recovered from the Washita river (Tr. 49). A concrete block was attached to the body by means of a log chain which was wrapped around the victim's legs (Tr. 654; State's Exhibit No. 14). A subsequent autopsy of the body revealed that death was caused by gunshot wounds to the head and the chest (Tr. 667). The victim had suffered numerous other cuts and injuries, all of which were inflicted before death (Tr. 661-662, 669). The police also eventually recovered the gun that Anthony Mann and Bobby Glass had attempted to dispose of, and determined that it was the murder weapon (Tr. 387-388, 403-404, 402-408, 410, 412, 424, 677-678).

On February 18, 1983 the State filed charges of First Degree Murder regarding the death of Charles Keene, and warrants were issued for the arrest of defendant and the co-defendants (O. R. 1, 12-15). On February 20, 1983, the defendant and Anthony Mann were arrested in Eufaula, Oklahoma.

The jury found the Petitioner guilty of Murder in the First Degree in the first stage. In the second stage of the trial, the jury found one aggravating circumstance, that the murder was especially heinous, atrocious or cruel. (Tr. 870).

REASONS WHY THE WRIT SHOULD BE DENIED

PROPOSITION I

THE ADMISSION INTO EVIDENCE OF COLOR PHOTOGRAPHS OF THE VICTIM DID NOT RENDER THE TRIAL OR SENTENCING OF THE PETITIONER SO FUNDAMENTALLY UNFAIR AS TO DENY DUE PROCESS.

The Petitioner contends that his constitutional rights were violated by the admission into evidence of two color photographs

which were introduced into evidence. The State contends that this was a state evidentiary question and there is no showing that the admission of the evidence has rendered the trial so fundamentally unfair as to deny due process.

In Donnelly v. De Christoforo, 416 U.S. 367 (1974), this Court stated that not every trial error or infirmity which might call for the application of supervisory power constitutes a failure to observe fundamental fairness essential to the very concept of due process. 416 U.S. at 642, citing Lisenba v. California, 314 U.S. 219, 236 (1941). The Court noted that when specific guarantees of the Bill of Rights are involved, the Supreme Court has taken special care to insure that prosecutorial conduct in no way impermissibly infringes them. Id. at 643. But the Court stated that, regarding an alleged trial error, constitutional error would not be found unless the error so effected the trial with unfairness as to make the resulting conviction a denial of due process. Id. at 634.

This Court has recently held in two state cases that the alleged trial errors did not meet this requirement. See Darden v. Wainwright, 106 S.Ct. 2464 (1986) (prosecutors closing arguments were not fundamentally unfair); and Holbrook v. Flynn, 106 S.Ct. 1340 (1986) (security force present in courtroom was not prejudicial).

In the present case the Oklahoma Court of Criminal Appeals found that the evidence in this case was "strong". Thompson v. State, 724 P.2d 780, 783 (Okla. Crim. App. 1986). A review of the facts cited by the Court of Criminal Appeals that this is true.

This court has never ruled on the admissibility of allegedly gruesome photographs in a criminal trial. Cf. Lisenba v. California, 314 U.S. at 227-29 (Court rejects contention that bringing two rattlesnakes in the courtroom prejudiced the defendant's rights). The Petitioner has failed to state why these particular photographs are of such importance that this court should grant certiorari and review his conviction and sentence.

Furthermore, this issue can be reviewed by a federal district court in a habeas proceeding, which is better equipped to review the photographs and determine whether the admission of such constituted a denial of fundamental fairness. See Nettles v. Wainwright, 667 F.2d 410, 414-15, (5th Cir., 1982). See also Evans v. Thigpin, 631 F.Supp. 274, 288-89 (S.D.Miss. 1986); and Godfrey v. Francis, 613 F.Supp. 747, 761 (N.D.Ga. 1985). Cf. Osborne v. Wainwright, 720 F.2d 1237 (11th Cir. 1983).

PROPOSITION II

A STATE MAY CONSTITUTIONALLY IMPOSE THE DEATH PENALTY UPON A PERSON WHO WAS SIXTEEN YEARS OLD AT THE TIME OF THE COMMISSION OF THE CRIME WHEN THE STATE HAS MADE THE DETERMINATION, AND THAT CONCLUSION IS SUPPORTED BY THE EVIDENCE, THAT THE PETITIONER INTENTIONALLY COMMITTED THE CRIME OF MURDER.

A. The objective factors existing in Oklahoma and other states preclude a finding by this Court that Oklahoma is attempting to impose a Cruel and Unusual Punishment upon the petitioner.

The Petitioner, in his second proposition, urges this Court to adopt as an aspect of the United States Constitution, the principle that the imposition of the death penalty upon a person who was fifteen years old at the time of the commission of an intentional murder, constitutes cruel and unusual punishment per se.

With regard to the review of punishments under Eighth Amendment principles, this Court has noted that a "heavy burden rests upon those who would attack the judgment of the representatives of the people" and that the Court will presume the validity of a punishment of a democratic legislature. Gregg v. Georgia, 428 U.S. 153, 175 (1976). Furthermore, in Coker v. Georgia, 433 U.S. 584 (1977), Justice White stated:

These Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment would be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence - history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted . . . 433 U.S. at 592.

This Court has been reluctant to impose inflexible rules on the states' criminal justice procedures. See Barker v. Wingo, 407 U.S. 514, 522-25 (1972). With regard to Eighth Amendment judgments, this Court has refused to become engaged in "the basic line-drawing process that is preeminently the province of the legislature" Rummel v. Estelle, 445 U.S. 263, 275, (1980).

This Court has repeatedly recognized that "we may not act as judges as we might as legislators," Gregg v. Georgia, supra, 428 U.S. at 175 (Stewart, J., plurality opinion), and that the Constitution has not given this Court a "roving commission" to impose upon the states its own motion of enlightened policy. Rummel v. Estelle, supra, 445 U.S. at 285 (Stewart, J., concurring). The subjective views of individual Justices should not be the basis of Eighth Amendment judgments. Rhodes v. Chapman, 452 U.S. 337, 346, (1981); Furman v. Georgia, supra, 408 U.S. at 405-06 (Blackman, J., dissenting). Additionally, this Court has acknowledged that a decision by the Supreme Court "that a given punishment is impermissible cannot be reversed short of a constitutional amendment." Gregg v. Georgia, supra, 428 U.S. at 176.

In Barker v. Wingo, supra, 407 U.S. 514 (1972), this Court rejected a suggestion that it adopt a specific time period within which a defendant must be offered a trial. Noting that such a rule was recommended by the American Bar Association, the Court stated:

"(s)uch a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specific number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise".

407 U.S. at 523.

B. The legislature of a state is the proper forum for establishing guidelines for determining criminal responsibility and accountability and if there is evidence supportive of such a finding in an individual case the State should be allowed to impose the death penalty for an act of intentional murder.

The complexities involving the appropriate criminal sanctions for juveniles also weigh heavily against this Court setting a fixed line beneath which a state may never go in determining what is the proper age for assessing the death penalty in a particular case. The great variance between maturity levels of individual adolescents was previously noted by Justice Powell in his dissent in Fare v. Michael C., 442 U.S. 707 (1979), where he stated:

Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully 'street-wise,' hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the Court indicated in In re Gault, (citation omitted), the facts relevant to the care to be exercised in a particular case vary widely. They include the minor's age, actual maturity, family environment, education, emotion and mental stability, and, of course, any prior record he might have.

442 U.S. at 734, n.4

The adoption of the "totality of the circumstances" test regarding the admissibility of juvenile confessions by the majority in Fare is in itself a recognition by this Court of the differing types of juveniles a system of justice will confront. The majority in Fare stated this test "refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation." 442 U.S. at 725-26.

In the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967), it was noted:

It is recognized that some youths handled by juvenile courts are hardened, dangerous offenders, while some adults older than the arbitrary upper age level are emotionally and sometimes physically immature individuals.

p. 119

and later,

No chronological age bracket is uniformly identical or entirely homogenous." p. 120.

The existence of certification, waiver, and transfer

statutes in various states, is in itself a recognition of the necessity of making individual determinations concerning criminal responsibility in cases involving young offenders. This Court has noted that "an overwhelming majority of jurisdictions permits transfer in certain instances." Breed v. Jones, 421 U.S. 519, 535 (1975).

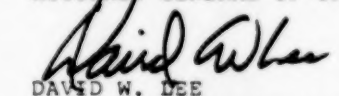
Nothing in the Eighth Amendment implies that a person's chronological age should be anything more than a factor for the sentencing authority to consider when imposing sentence. As long as the state does not interfere with the sentencer's ability to take age into account when making the decision whether to impose the penalty of death, and if the evidence supports the decision that the defendant is accountable as defined by applicable state law, the sentence should be upheld.

CONCLUSION

For the reasons stated, it is respectfully requested that the Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA


DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL & FEDERAL DIVISIONS

WILLIAM H. LUKER
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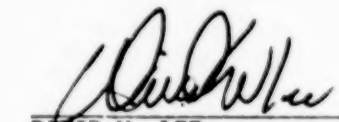
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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF MAILING

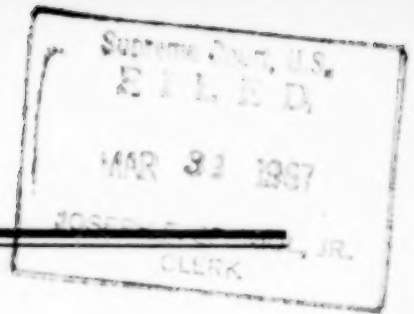
On this 21st day of January, 1987, a true and correct copy of the foregoing was mailed, postage prepaid, to:

Harry F. Tepker, Jr.
College of Law
University of Oklahoma
300 Timberdell
Norman, Oklahoma 73019


DAVID W. LEE

5333A
Ms

No. 86-6169



IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,
Petitioner

v.

STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals
of the State of Oklahoma

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 22, 1986
CERTIORARI GRANTED FEBRUARY 23, 1987

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CHRONOLOGY

1983

- Feb. 18: Information and arrest warrant filed.
- Feb. 22: Petition for Delinquency and Accountability (District Court of Grady County, Case No. JFJ-83-12).
- Apr. 22: Court decides to hold Thompson accountable as if he was an adult. Certification Order (District Court of Grady County, Case No. JFJ-83-12).
- Apr. 22: First Amended Information filed (R. 31).
- Apr. 23: First appearance for Thompson; Bond denied.
- June 9: Thompson bound over for trial (R. 43-44).
- June 20: Counsel for Thompson files Petition In Error appealing the District Court order that certified Thompson to stand trial as if he was an adult (Case No. J-83-362).
- July 8: Thompson is arraigned; pleads not guilty. Trial date is set for Sept. 19, 1983. (R. 63-64).
- July 15: Bill of Particulars In Rem Punishment is filed (R. 88).
- July 15: Attorney McConnell files motion to withdraw as counsel for Thompson (R. 90).
- Aug. 9: Attorney McConnell's motion to withdraw is overruled. (R. 100).
- Sept. 14: Motion for severance granted (R. 130).
- Sept. 23: Co-defendant Glass is found guilty of first degree murder; sentenced to death (R. 253).
- Dec. 5-Dec. 9: Trial of William Wayne Thompson
- Dec. 8: Thompson found guilty of first degree murder (R. 349)
- Dec. 9: Jury fixes punishment at death (R. 367).

1983

Dec. 16: Co-defendant Jones is found guilty of first-degree murder; sentenced to death (R. 432, 447)

1984

Jan. 6: Thompson is sentenced; Death warrant issued (R. 478, 479 et. seq.).

Jan. 6: Notice of Intent to Appeal (R. 494-96).

Jan. 10: Judgment and Sentence on Conviction filed, District Court of Grady County, January 10, 1984 (No. CRF-83-45) (R. 512).

Jan. 10: Appointment of Oklahoma Appellate Public Defender (R. 509)

Jan. 13: District Court's certification allowing Thompson to stand trial as if he was an adult is affirmed by order of the Oklahoma Court of Criminal Appeals. (Case No. J-83-362) (R. 510-11)

Jan. 13: Order of Court of Criminal Appeals of Oklahoma staying execution of Wayne Thompson (R. 538).

Mar. 1: Co-defendant Mann is found guilty and is sentenced to death (R. 610, 624).

1986

Aug. 29: Opinion of the Court of Criminal Appeals of Oklahoma affirming judgment and sentence (No. F-84-29).

Sept. 24: Rehearing denied.

Dec. 22: Petition for Writ of Certiorari docketed.

1987

Feb. 23: Petition for Writ of Certiorari granted.

IN THE DISTRICT COURT OF GRADY COUNTY
STATE OF OKLAHOMA

No. JFJ-83-12

IN THE MATTER OF WILLIAM WAYNE THOMPSON,
A MALE CHILD UNDER EIGHTEEN YEARS OF AGE

PETITION FOR DELINQUENCY
AND ACCOUNTABILITY

Comes now Tony R. Burns, District Attorney for Grady County, State of Oklahoma, and alleges:

That the above named William Wayne Thompson, residing at 320 Illinois Ave., Chickasha, Oklahoma, is a child 15 years of age, within purview of the Juvenile Division of the District Court, and is a delinquent child for the following reason, to-wit:

That said Juvenile did on or about the 23rd day of January, 1983, in Grady County, Oklahoma, unlawfully, wrongfully, willfully commit the crime of Murder In The First Degree in the manner and form as follows: That said Juvenile did, with malice aforethought and with a premeditated design to effect death, without authority of law, effect the death of Charles Keene by beating him with his boots or shoes, shooting him with a firearm and by slashing his throat and body with a sharp instrument, then and there inflicting mortal wounds in the body of Charles Keene from which mortal wounds Charles Keene did languish and die on the 23rd day of January, 1983, contrary to the Statute in such cases made and provided and against the peace and dignity of the state.

That the parents of said child are father, J. B. Thompson, Sr., 320 Illinois Ave., Chickasha, Oklahoma; his mother, Dorothy Thompson, 320 Illinois Ave., Chickasha, Oklahoma.

WHEREFORE, Petitioner prays that summons to be issued and that this matter be set for hearing according to law. That at said hearing the Court find that the alleged said child is guilty, and that said child is delinquent because of his aforesaid act. That the Court further find that said child is competent and had the mental capacity to know and appreciate the wrongfulness of his said act at the time committed. That said child be found accountable and be held for preliminary hearing and trial for said alleged criminal act.

Filed: February 22, 1983.

TONY R. BURNS
District Attorney

By: /s/ [Illegible]
Assistant District Attorney

(Affidavit Omitted in Printing)

IN THE DISTRICT COURT OF GRADY COUNTY
STATE OF OKLAHOMA

(Title Omitted in Printing)

CERTIFICATION ORDER

On March 29, 1983, the Court heard the testimony of 5 witnesses and received 7 exhibits into evidence, and found (1) that the crime of Murder in The First Degree had occurred and (2) probable cause to believe that the respondent William Wayne Thompson committed said crime.

On April 21, 1983, the Court heard the testimony of 9 witnesses and received 7 additional exhibits into evidence. After considering the testimony of the witnesses at both hearings and a careful examination of the exhibits the Court further found substantial evidence that:

- (1) This was a very serious offense to the community which resulted in the death of an individual. The offense was committed in an aggressive, violent, premeditated and willful manner as shown by the wounds and injuries to the body of Charles Keene (two gunshot wounds, slashed throat and belly, broken leg and head injuries) and the manner in which the body was concealed (chained to a concrete block and placed in a river) and the instrumentalities used to effect his death (a gun and knife or knives).

10 O.S. § 1112 B 1

- (2) The offense was committed against a person which resulted in the death of that person from injuries which were, beyond any doubt, intentionally inflicted.

10 O.S. § 1112 B 2

- (3) Although the respondent does not have as high an I.Q. or as great an intelligence as other individuals, there is no evidence from any witness or in either psychological report (State's exhibit —, Respondent's Exhibit 3) that he is retarded or suffers from any organic or psychotic illness. The testimony of Dr. Klein, the lay witnesses and the psychological reports show unquestionably that he knows right from wrong and understands the consequences of his actions and that he just doesn't care. The evidence also shows that the respondent is street wise and that he has the sophistication and maturity necessary to understand and appreciate the wrongful nature of his actions.

10 O.S. § 1112 B 3

- (4) The respondent has a long and very antisocial history of previous contacts with law enforcement authorities (7 arrests before this homicide and 2 after). Four of these arrests have been for offenses against a person (2 assault and batteries, 2 assault and batteries with a knife). One of the assault and batteries occurred *after* the date of this homicide. The respondent has previously received counseling by the Youth Services organization and by the Court Related and Community Services division of the Department of Human Services. The respondent has previously been placed in an institution outside of the community (The boys Ranch, Edmond, Okla.). The respondent has previously been adjudicated a delinquent child and placed on formal probation.

10 O.S. § 1112 B 4

- (5) The prospects for adequate protection of the public are low if the respondent is merely ad-

judicated a delinquent child and placed in the custody of the Department of Human Services. This is at least the fourth of five incidents of aggressive behavior, with the behavior becoming increasingly violent and dangerous. Neither counseling nor institutionalization have had any positive affect on this juvenile. The witnesses from the Department of Human Services could offer no possible placement within the Department with any services that hold out any reasonable prospect for rehabilitation of this juvenile. The best the Department could do for this juvenile would be to warehouse him until he was 18. Furthermore, from the testimony of the psychologist, Dr. Klein, and the respondent's counsellor, Mary Robinson, as well as from the testimony of the lay witnesses, the Court finds substantial and persuasive evidence that this juvenile is not amenable to any rehabilitation efforts as long as he remains in the juvenile justice system.

10 O.S. § 1112 B 5

- (6) This offense did not occur while the juvenile was escaping or in an escaped status from an institution for delinquent children. However, it is interesting to note that while this juvenile was institutionalized in the Boy's Ranch in Edmond, Oklahoma, he received a special home leave (Christmas) and refused to return.

Based upon a careful consideration of the statutory guidelines provided in 10 O.S. § 1112, other cases wherein the Court of Criminal Appeals has provided rules for the District Courts to follow in certification hearings, *Matter of Sanders* Okla. Cr. 564 p.2 273 (1977), *Matter of R.P.R.G.* Okla. Cr. 584 p.2 239 (1978), *Matter of G.D.C.* Okla. Cr. 581 p.2 908 (1918), and *Sherfield v State* Okla.

Cr. 511 p.2 598 (1978), and the testimony of the 14 witnesses and 14 exhibits at the two hearings held in this case, the Court finds that there are virtually no *reasonable* prospects for rehabilitation of William Wayne Thompson within the juvenile system and that William Wayne Thompson should be held accountable for his acts as if he were an adult and should be certified to stand trial as an adult. Done this 21st day of April, 1983.

/s/ Oteka L. Alford
 OTEKA L. ALFORD
 Associate District Judge

IN THE DISTRICT COURT
 IN AND FOR GRADY COUNTY
 STATE OF OKLAHOMA

(Title Omitted in Printing)

FIRST AMENDED INFORMATION

STATE OF OKLAHOMA, COUNTY OF GRADY, ss:

I, the undersigned District Attorney of said county, in the name, by the authority, and on behalf of the State of Oklahoma, give information that on about the 23rd day of January A.D., 1983 in said County of Grady and State of Oklahoma, one BOBBY JOE GLASS, ANTHONY JAMES MANN, RICHARD JONES AND WILLIAM WAYNE THOMPSON did then and there unlawfully, wrongfully, willfully commit the crime of MURDER IN THE FIRST DEGREE in the manner and form as follows:

That said Defendant did, with malice aforethought and with a premeditated design to effect death, while acting together jointly in concert, each with the other, without authority of law, effect the death of Charles Keene by beating him with their boots and shoes, shooting him with a firearm and by slashing his throat and body with a sharp instrument, then and there inflicting mortal wounds in the body of Charles Keene from which mortal wounds Charles Keene did languish and die on the 23rd day of January, 1983;

contrary to the form and statute in such cases made and provided and against the peace and dignity of the state.

TONY R. BURNS
 District Attorney

By: /s/ [Illegible]
 Assistant District Attorney

STATE OF OKLAHOMA, COUNTY OF GRADY, ss:

I do hereby solemnly swear that I have read the above and foregoing information, know the content thereof, and that the statements therein contained are true:

/s/ [Illegible]

Subscribed and sworn to before me this 22nd day of April, 1983.

/s/ [Illegible]

GLEND A FENIMORE
Court Clerk

WITNESSES FOR THE STATE OF OKLAHOMA:

Terry Cunningham, Sheriff's Office, Chickasha, Okla;
Robert Lee, OSBI, Lawton, Okla;
Jack Daley, OSBI, Lawton, Okla;
John Greg, OSBI, Lawton, Okla;
Ken Reed, Chickasha P.D., Chickasha, Okla;
Dany Sterling, Chickasha P.D., Chickasha, Okla;
Fred Jordan, Medical Examiner, Box 26901,
Oklahoma City, Okla;
Jerry Peters, OSBI, Oklahoma City, Okla;
Mary Long, OSBI, Oklahoma City, Okla;
James Looney, OSBI, Oklahoma City, Okla;
Ann Reid, OSBI, Oklahoma City, Okla;
Randy Jackson, Sheriff's Office, Chickasha, Okla;
Royce Whybark, Sheriff's Office, Chickasha, Okla;
Dr. Crowell, Grady Memorial Hospital, Chickasha, Okla;
Donetta Bradford, 304 South 18th, Frederick, Okla;
Malcolm Brown, Chickasha, Okla;
Lucille Brown, Chickasha, Okla;
Dorothy Thompson, 320 Illinois, Chickasha, Okla;
Charlotte Mann, 929 North 12, Chickasha, Okla;
Charlesetta Garcia, 412 North 4th, Chickasha, Okla;

Vickie Keene, Box 139, Amber, Okla;
Charles Camp, 1510 Missouri, Chickasha, Okla;
Marcia Camp, 1510 Missouri, Chickasha, Okla;
Jerry Freitag, 3225 California, Chickasha, Okla;
Gary Beggs, 3229 California, Chickasha, Okla;
Tommy Kirk, 315 North 1st, Chickasha, Okla;
Rusty Featherstone, OSBI, Oklahoma City, Okla;
Bennie McCathey, 412 North 4th, Chickasha, Okla;
Danny Mann, Rt. 2, Rt. 2, Box 120, Ninnekah, Okla;
Gordon L. McCarthy, 412 North 4th, Chickasha, Okla;
Al Cheek, Sheriff Office, McIntosh County, Eufaula, Okla;
Jim Nixon, Eufaula, Okla;
Ron Taylor, Sheirff, Grady County, Chickasha, Okla;
Harvey Pratt, OSBI, Oklahoma City, Okla;
Jim Smith, Town Oak Apartments, Chickasha, Okla;
Jim Madison, Federal Correctional Center, El Reno, Okla;
Ohal Brand, Route 2, Ninnekah, Okla;
Elton L. Crick, El Reno P.D., El Reno, Okla;
Helen Lkein, 2500 South McGee, Norman, Okla;
David Reed, Otasco, Chickasha, Okla;
Stacey Knight, Chickasha, Okla;
Bill Day, Chief of Police, Eufaula, Oklahoma

IN THE DISTRICT COURT OF GRADY COUNTY
STATE OF OKLAHOMA

(Title Omitted in Printing)

**BILL OF PARTICULARS
IN REM PUNISHMENT**

I, the undersigned District Attorney of the Sixth District Grady County, State of Oklahoma, do upon my official oath further give the said Court to know and be informed that the offense of Murder In The First Degree as charged within the original information, was committed by the said William Wayne Thompson, named therein and should be punished by death, due to and as a result of the following aggravating circumstances, to-wit:

1. The murder was especially heinous, atrocious or cruel;
2. The existence of a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society.

/s/ Tony R. Burns
TONY R. BURNS
District Attorney

[Certificate of Service Omitted in Printing]

IN THE DISTRICT COURT OF GRADY COUNTY
STATE OF OKLAHOMA

SELECTED JURY INSTRUCTIONS: December 8, 1983

No. 17

Should you find from the evidence, under the Instructions and beyond a reasonable doubt that the defendant is guilty of **MURDER IN THE FIRST DEGREE** as charged in the Information and as defined in these Instructions, then you should find the defendant guilty as charged. But if you do not so find or should you entertain a reasonable doubt thereof, then in either of said latter events, you should find the defendant not guilty.

You are further instructed that the statutes of the State of Oklahoma provide that a person who is convicted of **MURDER IN THE FIRST DEGREE** shall be punished by death or by imprisonment for life.

At this stage of the trial, insofar as the charge of **MURDER IN THE FIRST DEGREE** is concerned, you shall limit your deliberation to whether you find the defendant guilty or not guilty. The question of punishment, if any, for **MURDER IN THE FIRST DEGREE** is not before you at this time. If you find the defendant guilty of **MURDER IN THE FIRST DEGREE**, there will be a subsequent sentencing proceeding for you the jury to determine whether the defendant should be sentenced to death or life imprisonment.

No. 18

The Court has made rulings in the conduct of the trial and the admission of evidence. In so doing, I have not expressed nor intimated in any way the weight or credit to be given any evidence or testimony admitted during the trial, nor have I indicated in any way the conclusions to be reached by you in this case.

It is your responsibility to determine the credibility of each witness and the weight to be given the testimony of each witness. In determining such weight or credibility, you may properly consider: the interest, if any, which the witness may have in the result of the trial; the relation of the witness to the parties, the bias or prejudice of the witness, if any has been apparent; the candor, fairness, intelligence, and demeanor of the witness; the ability of the witness to remember and relate past occurrences, the means of observation, and the opportunity of knowing the matters about which the witness has testified. From all the facts and circumstances appearing in evidence and coming to your observation during the trial, aided by the knowledge which you each possess in common with other persons, you will reach your conclusions. You should not let sympathy, sentiment, or prejudice enter into your deliberations, but should discharge your duties as jurors impartially, conscientiously, and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions.

From time to time during this trial, the attorneys have made objections that I have ruled on. You should not speculate upon the reasons why objections were made. If I approved or sustained an objection, you should not speculate on what might have been said or what might have occurred had the objection not been sustained by me.

After you have retired to consider your verdict, select one of your number as foreman and enter upon your deliberations. When you have agreed on a verdict, your

foreman alone will sign it, and you will, as a body, return it in open court. Your verdict must be unanimous. Forms of verdict will be furnished. You will now listen to the argument of counsel which is a proper part of this trial.

Given this 8th day of December 1983.

/s/ James R. Winchester
JAMES R. WINCHESTER
Associate District Judge



SUPPLEMENTAL INSTRUCTION**No. 19**

You have asked the question Has the Defendant been certified as an adult.

ANSWER: Yes.

/s/ James R. Winchester
JAMES R. WINCHESTER

SENTENCING PROCEEDING: JURY INSTRUCTIONS.

December 8, 1983

No. 1

The defendant in this case has been found guilty by you, the jury, of the offense of MURDER IN THE FIRST DEGREE. It is now your duty to determine the penalty to be imposed for this offense.

Under the law of the State of Oklahoma, every person found guilty of MURDER IN THE FIRST DEGREE shall be punished by death or imprisonment for life.

No. 2

In the sentencing state of this trial, the State has filed a document called a bill of particulars. In this bill of particulars, the State alleges the defendant should be punished by death, because of the following aggravating circumstances:

1. The murder was especially heinous, atrocious, or cruel;
2. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

No. 3

The defendant has entered a plea of not guilty to the allegations of this bill of particulars, which casts on the State the burden of proving the material allegations in this bill of particulars beyond a reasonable doubt.

This bill of particulars simply states the grounds upon which the State seeks imposition of the death penalty. It sets forth in a formal way the aggravating circumstances of which the defendant is accused. It is, in itself, not evidence that any aggravating circumstances exist, and you must not allow yourselves to be influenced against the defendant by reason of the filing of this bill of particulars.

The defendant is presumed to be innocent of the charges made against him in the bill of particulars, and innocent of each and every material element of said charges, and this presumption of innocence continues unless his guilt is established beyond a reasonable doubt. If, upon consideration of all the evidence, facts, and circumstances in the case, you entertain a reasonable doubt of the guilt of the defendant of the charges made against him in the bill of particulars, you must give him the benefit of that doubt and return a sentence of life imprisonment.

No. 4

You are instructed that, in arriving at your determination of punishment, you must first determine whether at the time this crime was committed any one or more of the following aggravating circumstances existed beyond a reasonable doubt:

1. The murder was especially heinous, atrocious, or cruel;
2. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

No. 5

As used in these instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

The phrase "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

No. 6

Aggravating circumstances are those which increase the guilt or enormity of the offense. In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these instructions.

Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you would be authorized to consider imposing a sentence of death.

If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life.

No. 7

Mitigating circumstances are those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.

No. 8

Evidence has been offered as to the following mitigating circumstances:

1. The existence of youthfulness of the defendant.

No. 9

If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances, the death penalty shall not be imposed.

No. 10

If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the law requires that you reduce such findings to writing by stating specifically what aggravating circumstances existed, if any. This finding must be made a part of your verdict.

You must indicate this finding by checking the box next to such aggravating circumstances on the appropriate verdict form furnished you, and such verdict form must be signed by your foreman.

The law does not require you to reduce to writing the mitigating circumstances you find, if any.

No. 11

In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider only the evidence received here in open court presented by the State and the defendant during the sentencing phase of this proceeding.

All the previous instructions given you in the first part of this trial apply where appropriate and must be considered together with these additional instructions. Together they contain all the law of any kind and the rules you must follow in deciding this case. You must consider them all together and not just a part of them.

You are the determiner of the facts. The importance and worth of the evidence is for you to decide.

I have made rulings during the second part of this trial. In ruling, I have not in any way suggested to you, nor intimated in any way, what you should decide. I do not express any opinion whether or not aggravating circumstances did or did not exist, nor do I suggest to you in any way the punishment to be imposed by you.

You must not use any kind of chance in reaching a verdict, but you must rest it on the belief of each of you who agrees with it.

You have already elected a foreman. In the event you assess the death penalty, your verdict must be unanimous. You may also return a unanimous verdict of imprisonment for life. Proper forms of verdict will be given you which you shall use in expressing your decision. When you have reached a verdict, all of you in a body must return it into open court.

The law provides that you shall now listen to and consider the further arguments of the attorneys.

Dated this 9th day of December, 1983.

/s/ James R. Winchester
JAMES R. WINCHESTER

SUPPLEMENTAL INSTRUCTION

No. 12

You have asked the question Please define mitigating.

Answer: You have your instructions, please continue deliberation.

/s/ James R. Winchester
JAMES R. WINCHESTER

SUPPLEMENTAL INSTRUCTION

No. 13

You have asked the question If sentenced for life what would be parole eligibility?

ANSWER: That is an executive decision, not judicial.
You have your instructions.

/s/ James R. Winchester
JAMES R. WINCHESTER

IN THE DISTRICT COURT OF THE
SIXTH JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA
SITTING IN AND FOR GRADY COUNTY

(Title Omitted in Printing)

Filed December 9, 1983

**[JURY VERDICT RE
AGGRAVATING CIRCUMSTANCES]**

We, the jury, impaneled and sworn in the above entitled cause, do upon our oaths unanimously find the following statutory aggravating circumstance or circumstances as shown by the circumstance or circumstances checked:

- ✓ The murder was especially heinous, atrocious, or cruel;

The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

/s/ Floyd E. Marshall
Foreman

IN THE DISTRICT COURT OF THE
SIXTH JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA
SITTING IN AND FOR GRADY COUNTY

(Title Omitted in Printing)

Filed December 9, 1983

[JURY VERDICT FIXING PUNISHMENT AT DEATH]

We, the jury, impaneled and sworn in the above entitled cause, do upon our oaths, having heretofore found the defendant WAYNE THOMPSON, guilty of Murder in the First Degree, fix his punishment at death.

/s/ Floyd E. Marshall
Foreman

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. J-83-362

IN THE MATTER OF W.W.T., A CHILD
UNDER THE AGE OF EIGHTEEN YEARS,
-vs- *Appellant,*
THE STATE OF OKLAHOMA,
Appellee.

Filed January 13, 1984

**ORDER AFFIRMING CERTIFICATION TO
STAND TRIAL AS AN ADULT**

W.W.T. was charged on the 22nd day of February, 1983, for Murder in the First Degree, in the District Court of Grady County. A finding of prosecutive merit was had on the 29th day of March, 1983. On April 21, 1983, the amenability to prosecution hearing was held, which resulted in an order certifying W.W.T. to stand trial as an adult.

A petition for rehearing was filed with this Court on the 20th day of June, 1983. It contained the following two specifications of error:

- a. Error of the Court in overruling Appellant's demurrer to the evidence.
- b. Error of the Court in refusing to grant a continuance.

Only the transcript of the hearing on prosecutive merit was filed in this case. No briefs have been filed in support of the contentions, as required by 22 O.S.1981, ch. 18, App. Rule 7.5(c). We shall therefore only consider the allegations upon the face of the record before us.

We are first convinced that the demurrer to the evidence was properly overruled. The transcript reveals that, on the 18th day of February, 1983, the body of one Charles Keene was found lying at the bottom of the Washita River in Grady County. The body had two gunshot wounds; the throat and chest were both cut; and it was weighted down with concrete blocks and log chains. Witness testimony established that, beginning on the 22nd day of January, 1983, the appellant admitted to several persons that he was responsible for the killing. There was also testimony that the appellants boots had hair stuck in the soles on or about the 22nd day of January. We are convinced the State sufficiently established the prosecutive merit of the case.

The record does not support the appellant's second allegation of error that a continuance was denied. Accordingly, it is dismissed.

The certification to stand trial as an adult is therefore **AFFIRMED.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 11th day of January, 1984.

/s/ Hez J. Bussey
HEZ J. BUSSEY
Presiding Judge

/s/ Tom R. Cornish
TOM R. CORNISH
Judge

/s/ Tom Brett
TOM BRETT
Judge

ATTEST:

/s/ [Illegible]
Clerk

IN THE DISTRICT COURT OF GRADY COUNTY,
STATE OF OKLAHOMA

No. CRF-83-45

STATE OF OKLAHOMA,

Plaintiff,

vs.

WAYNE THOMPSON,

Defendant.

JUDGMENT AND SENTENCE ON CONVICTION

Now on this 6th day of January, 1984, the same being a juridicial day of said Court, and the time duly appointed for judgment, and the Defendant WAYNE THOMPSON being personally present in the Court by his attorney of record, ED McCONNELL, and having been legally charged with the offense of MURDER FIRST DEGREE and having been duly informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly pleaded not guilty to said offense after having been duly advised of his rights; and having been duly and legally tried and convicted of the crime of MURDER FIRST DEGREE and the Defendant, having been asked by the Court whether he has any legal cause to show why judgment and sentence should not be pronounced against him and he stating no sufficient cause why judgment and sentence should not be pronounced against the defendant, and none appearing to the Court, it is the judgment of the Court that said defendant is guilty of the crime of MURDER FIRST DEGREE.

IT IS THEREFORE ORDERED AND ADJUDGED BY THE COURT that the said WAYNE THOMPSON be committed to the custody of the STATE DEPARTMENT OF CORRECTIONS for ADMINISTRATION OF DEATH BY INJECTION, to be transported by the Sheriff of Grady County to the LEXINGTON ASSESSMENT AND RECEPTION CENTER at Lexington, Oklahoma, for commitment as reflected by this Judgment and Sentence at a facility designated by the STATE DEPARTMENT OF CORRECTIONS.

The Court further advised the defendant of his right to appeal the Court of Criminal Appeals of the State of Oklahoma, of the necessary steps to be taken by him to perfect such appeal, and that if he desired to appeal and was unable to afford counsel and a transcript of the proceedings, that the same would be furnished by the State without cost to him.

IT IS FURTHER ORDERED that the Sheriff of Grady County transport said defendant to the LEXINGTON ASSESSMENT AND RECEPTION CENTER at Lexington, Oklahoma, and leave therewith a copy of this Judgment and Sentence to serve as warrant and authority for the imprisonment of said defendant as provided herein. A second copy of this judgment and sentence to be warrant and authority of said Sheriff for the transportation and imprisonment of said defendant as hereinbefore provided. The Sheriff to make due return to the Clerk of this Court with the proceedings endorsed thereon.

/s/ James R. Winchester
Judge

ATTEST:

GLEND A FENIMORE
Court Clerk

By: /s/ Sharon O'Neal
Deputy

SEAL:

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. F-84-29

WILLIAM WAYNE THOMPSON,
Appellant,

—vs—

STATE OF OKLAHOMA,
Appellee.

August 29, 1986

OPINION

BRETT, Judge:

Having been certified to stand trial as an adult, William Wayne Thompson was tried for First Degree Murder [21 O.S.1981, § 701.7(A)] in Grady County District Court, Case No. CRF-83-45. The jury found him guilty as charged and fixed his punishment at death. Judgment and sentence were rendered accordingly and appellant appeals. We affirm.

The evidence at trial showed that appellant, his brother Anthony James Mann, Bobby Glass, and Richard Jones murdered Charles Keene, the appellant's former brother-in-law, in the early morning hours of January 23, 1983. Keene was shot once in the head and once in the chest, and his throat, chest, and abdomen had been cut. He also had multiple bruises and abrasions, especially about his face and head, and his left leg was broken. Keene's body was chained to a concrete block and thrown into the

Washita River, where it remained undiscovered until February 18, 1983. The four co-defendants were tried separately. Each received the death penalty.

Appellant raises three assignments of error that pertain to the guilt stage of the trial. He first argues that the prosecutor "set the stage for a long line of requests for sympathy for the victim during voir dire." As trial counsel failed to object to any of these statements or questions, the alleged error has not been properly preserved for review. See *Nucklos v. State*, 690 P.2d 463 (Okl. Cr. 1984). We conclude from our examination of the record that there was no fundamental error.

Appellant relies on *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983) for the proposition that excluding potential jurors simply because they are opposed to capital punishment denies the accused of a trial by a fair and impartial cross-section of the community. Since this appeal was filed, the *Grigsby* case has been affirmed by the circuit court, 758 F.2d 226 (8th Cir. 1985), but reversed by the Supreme Court *sub nom. Lockhart v. McCree*, — U.S. —, 106 S.Ct. 1758, — L.Ed.2d — (1986). The United States Supreme Court rejected this proposition as did this Court in *Foster v. State*, 714 P.2d 1031 (Okl. Cr. 1986). Moreover, this argument was not raised at trial and cannot, therefore, be raised on appeal. See *Nuckols*, 690 P.2d at 469.

Appellant's final assignment of error that would affect the conviction is that the trial court committed reversible error by admitting into evidence a video tape depicting the recovery of the victim's body from the river and three color photographs of the victim. Trial counsel objected to the exhibits on the basis that all were gruesome and more prejudicial than useful, that they only emphasized and re-emphasized matters that were covered less graphically by the medical examiner. The trial court found that the probative value of the photographs and video tape outweighed their prejudicial effect and that

they were relevant to show the condition and location of the body at the time it was recovered.

We have viewed the video tape and did not find it to be gruesome. No close-up views of the body were shown to the jury. Admitting the tape into evidence was not error. Nor was it error to admit the photograph of the victim showing the chain wrapped around his legs and a concrete block as that picture was not particularly gruesome.

The other two color photographs, however, were gruesome. Admitting them into evidence served no purpose other than to inflame the jury. We do not understand why an experienced prosecutor would risk reversal of the whole case by introducing such ghastly, color photographs with so little probative value. We fail to see how they could possibly assist the jury in the determination of defendant's guilt. The trial court's admission of these two photographs was error. *See Oxendine v. State*, 335 P.2d 940 (Okl. Cr. 1958).

Nevertheless, the evidence against the appellant was so strong that the error does not require reversal. *See Newbury v. State*, 695 P.2d 531 (Okl. Cr. 1985). Two witnesses—Donetta Bradford, appellant's girlfriend, and Charlesetta Garcia, Bobby Glass' girlfriend—testified that appellant told them that he had shot Charles in the head and cut his throat. Charlotte Mann, Anthony Mann's former wife, heard appellant tell his mother that Charles Keene was dead, that he had killed him, and that Vicki—the victim's ex-wife and the appellant's sister—did not have to worry about him anymore.

When appellant and the other co-defendants left their house on the evening of the murder, appellant told Bradford, "We're going to kill Charles." When they returned several hours later, appellant was wet from the chest down, his nose was bleeding, and he no longer had on the cap he had been wearing when he left.

Myrtle and Malcolm "Possum" Brown, who lived near the Washita River, returned from a vacation and retired

early the night Charles Keene¹ was killed. They were awakened by a gunshot and barking dogs. A man pounded on the door and shouted, "Possum, let me in. They're going to kill me." The Browns looked outside and saw three or four men beating another man. They heard one of the men say, "This is for the way you treated our sister." Mr. Brown telephoned the sheriff, but the men left soon after they realized the Browns were home and witnessing the fray. It was too dark for the Browns to identify any of the men.

The O.S.B.I. analyzed a stain on the Browns' front porch carpet and discovered it was caused by human blood group A, the same blood type of the victim. An expended .45 caliber Winchester Western cartridge case was found in the Browns' front yard; the same type of ammunition was used to kill Charles Keene. In the Browns' dogpen, fabric was found that had the same type design as the cap appellant had worn the night of the homicide.

The above recitation of facts is by no means exhaustive, but is demonstrative of how strong the evidence against appellant was. In view of this evidence, we cannot say that the two color photographs, although gruesome, affected the jury's determination that appellant was guilty as charged.

Finding no errors which would affect the conviction of first degree murder, we affirm that judgment. We turn now to a review of the sentencing.

Appellant alleges four categories of prosecutorial misconduct: comments requesting sympathy for the victim, comments arousing societal alarm, injecting matters not in evidence through improper cross-examination, and unfair characterization of the appellant. None of the statements falling in the first category were preserved for review as trial counsel made no objection. Having reviewed the record for fundamental error, we conclude that none of the comments warrant reversal or modification. *See Nuckols*, 690 P.2d at 471.

The comments that appellant claims were designed to arouse societal alarm were in fact, as the trial judge ruled them to be, comments on the appellant's propensity to commit acts of violence in the future. As that was one of the aggravating circumstances alleged and supported by evidence, we find the comments to be a fair comment on the evidence and within the permissible range of closing argument.

The alleged improper cross-examination was of character witnesses called by the defense. Most of the questions were proper under 12 O.S.1981, § 2405, which states that "[i]nquiry is allowable on cross-examination into relevant specific instances of conduct."

One question, however, was clearly improper. The prosecutor asked one defense witness whether he was related to Cecil Leroy Cloud. When the witness responded that Mr. Cloud was his father's step-brother, the prosecutor said, "That's the same Cecil Leroy Cloud that we sent to the pen for shooting with intent to kill, correct." We agree with appellate counsel that "[i]njection of the criminal record of a distant relative of a witness has no place in a criminal proceeding, and could not be termed anything other than an intentional effort at hurting the case of the accused." Notwithstanding, no objection was made at trial and we believe that such an obviously "cheap shot" discredited the prosecutor more than the witness. The error was not prejudicial and does not warrant modification of the sentence.

Appellant further complains that the prosecutor consistently sought to characterize him as being emotionally older than his chronological age. Defense counsel stressed appellant's youth as a mitigating factor, arguing that he should not be given the death penalty because he was young enough to change and improve himself. Defense counsel also tried to argue that appellant was a "normal little boy . . . just like other little boys." The prosecutor's arguments to the contrary were proper inferences from the evidence. The evidence did not show William Wayne

Thompson to be a typical sixteen-year-old, and the State properly argued that fact.

The appellant's next proposition is that the execution of William Wayne Thompson, who was fifteen at the time of the offense, would constitute cruel and/or unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and under Article Two, Section Nine of the Oklahoma Constitution. The same arguments now made by appellant were made by appellate counsel in *Eddings v. State*, 616 P.2d 1159 (Okl. Cr. 1980). This Court, unanimously rejecting the arguments, found that imposition of the death penalty on a minor certified to stand trial as an adult constitutes neither cruel nor unusual punishment. *Id.* at 1166-67.

The United States Supreme Court granted certiorari on the issue, *Eddings v. Oklahoma*, 450 U.S. 1040, 101 S.Ct. 1756, 68 L.Ed.2d 237 (1981), but then decided the case on another ground. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Upon reconsideration of the issue, we reaffirm our previous holding that once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult.

Next appellant argues that failure of the prosecutor to present evidence of specific aggravating circumstances at the preliminary hearing deprived the trial court of jurisdiction to sentence him to death. This Court has repeatedly rejected this argument. *See, e.g., Nuckols*, 690 P.2d at 469-70; *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1983). As a subproposition of error the appellant claims that the State failed to inform him of the evidence in aggravation it intended to present. The record, however, indicates that notice was given three months before trial. This assignment of error is totally without merit.

In the next assignment of error, appellant urges this Court to overrule the portion of *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980), *rev'd in part on other grounds sub nom. Chaney v. Brown*, 730 P.2d 1334 (10th Cir.

1984), that held that the instructions given provided the jury sufficient guidance to prevent an arbitrary or discriminatory application of the death penalty. *See id.* at 279-80. Substantially the same instructions were given in the case at bar, and we find them to be adequate for constitutional purposes. Furthermore, the instructions were not objected to at trial.

Appellant argues next that examination of one of its witnesses—the seven-year-old son of the victim—was improperly restricted by the court. The record does not bear out this allegation. The transcript of the proceedings conducted in chambers shows exactly what questions defense counsel wanted to ask. The trial court did instruct trial counsel not to ask other types of questions, but defense counsel neither indicated that he wished to do so nor objected to the limitation.

That the trial court erred in failing to instruct the jury, sua sponte, that he would impose a life sentence if they could not reach a verdict within a reasonable time is appellant's next contention. This Court has held that it is not even error to refuse to give such an instruction if it is requested. *Brogie v. State*, 695 P.2d 538 (Okl.Cr. 1985). The trial court did not err.

The appellant argues that the Eighth and Fourteenth Amendments to the United States Constitution do not permit the imposition of the death penalty because this Court has been evaluating the heinous-atrocious-cruel aggravating circumstance in an arbitrary manner. The death penalty convictions affirmed by this Court in which this aggravating circumstance has been found to exist have consistently passed constitutional challenge. *See Cooks v. State*, 699 P.2d 653 (Okl.Cr.), *cert. denied*, — U.S. —, 106 S.Ct. 268, 88 L.Ed.2d 275 (1985); *Cartwright v. State*, 695 P.2d 548 (Okl.Cr.), *cert. denied*, — U.S. —, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985); *Stout v. State*, 693 P.2d 617 (Okl.Cr.1984), *cert. denied*, — U.S. —, 105 S.Ct. 3489, 87 L.Ed.2d 623 (1985); *Nuckols v. State*, 690 P.2d 463 (Okl.Cr.1984), *cert. denied*,

— U.S. —, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985); *Robison v. State*, 677 P.2d 1080 (Okl.Cr.), *cert. denied*, 467 U.S. 1246, 104 S.Ct. 3524, 82 L.Ed.2d 831 (1984); *Davis v. State*, 665 P.2d 1186 (Okl.Cr.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 203, 78 L.Ed.2d 177 (1983); *Jones v. State*, 648 P.2d 1251 (Okl.Cr.1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 799, 74 L.Ed.2d 1002 (1983). Furthermore, the manner in which the murder was accomplished in this case was obviously heinous, atrocious or cruel. Before dying, the victim was severely beaten, had his leg broken, his throat and chest slashed, and knew for some time that his attackers ultimately were going to kill him.

Dr. Helen Kline, a clinical psychologist and director of the psychology department at Central State Hospital testified at the sentencing stage of the trial. Her testimony was used solely to prove the existence of a probability that the appellant would commit criminal acts of violence that would constitute a continuing threat to society.

Appellant argues that his Fifth and Sixth Amendment rights were violated because he was not warned of his right to remain silent during the two interviews with Dr. Kline, or that anything he said could be used against him. The original record was silent in this regard until appellant filed an affidavit dated November 21, 1985, stating he was not so warned. The State filed an affidavit dated April 1, 1986, saying she did warn him.

The United States Supreme Court has held that a criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. When a defendant is faced while in custody with a court-ordered psychiatric inquiry, the State may use his statements at the penalty phase only if the defendant was apprised of his rights and knowingly decided to waive them. *Estelle v. Smith*, 451 U.S.

454, 468-69, 101 S.Ct. 1866, 1876, 68 L.Ed.2d 359 (1981).

Appellant claims that his failure to object when Dr. Kline testified does not constitute waiver of this claim because the Supreme Court did not require a timely, specific trial objection in *Smith*. The Supreme Court, however, gave its reasons for rejecting the State's waiver argument,¹ and none of those reasons are applicable to the case at bar. Thus, we conclude that regardless of whether appellant was warned, he has forfeited this argument by failing to assert the claim at a time when the trial judge could have prevented any error.

Finally, appellant, relying on *Ake v. Oklahoma*, — U.S. —, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), argues that because the State utilized psychiatric testimony, it was error not to afford appellant a psychiatric witness to counter the State's evidence. Appellant does not allege that funds for a psychiatric witness were requested.

Even if a psychiatric witness was required by *Ake*, the *Ake* Court's reason for its ruling was to prevent the State from having a strategic advantage over a defendant that would create a risk of error in the proceeding absent a defense witness to counter-balance the State's expert testimony. In the case at bar, any advantage the State may have had was fruitless since the jury did not find the existence of the aggravating circumstance that the State intended to prove by Dr. Kline's testimony. Error, if any, was harmless and not cause for modification or reversal. See 20 O.S. 1981, § 3001.1.

Having addressed all the errors alleged by the appellant, this Court now turns to a determination of whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and

¹ The Supreme Court agreed with the Court of Appeals' reasons, to wit: that the State did not timely raise this argument; that objecting would have been a futile act under Texas law; and that defendant Smith's objection was essentially surprise. *Smith*, 451 U.S. at 468, n.12.

whether the evidence supports the jury's finding that the murder was especially heinous, atrocious, or cruel. 21 O.S.Supp.1985, § 701.13.

The victim herein was abducted from his home, severely beaten by four men, shot twice, and had his leg broken and his throat and chest slashed with a knife. When he attempted to escape and had a chance to call out for help, he was thrown into the trunk of a car. These facts amply support the conclusion that the murder was heinous, atrocious, or cruel.

The record discloses nothing to indicate that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Although appellant was the youngest of the four assailants, his participation was hardly minimal. The evidence showed that he personally kicked the victim in the head, shot the victim in the head, slit the victim's throat, and dragged the victim's weighted body into the river. The jury's decision clearly was based on the overwhelming evidence of appellant's culpability for this truly heinous crime.

The judgment and sentence are hereby **AFFIRMED**.

AN APPEAL FROM THE DISTRICT COURT OF
GRADY COUNTY, OKLAHOMA
THE HONORABLE JAMES R. WINCHESTER,
DISTRICT JUDGE

WILLIAM WAYNE THOMPSON, appellant, was convicted of First Degree Murder, in the District Court of Grady County, Case No. CRF-83-45, was sentenced to death, and he appeals. AFFIRMED.

E. ALVIN SCHAY
Appellate Public Defender
Norman, Oklahoma
Attorney for Appellant

MICHAEL C. TURPEN
Attorney General of Oklahoma
WILLIAM H. LUKER
Assistant Attorney General
Oklahoma City, Oklahoma
Attorneys for Appellee

Opinion by

BRETT, J., PARKS, P.J., Specially Concurs

BUSSEY, J., Specially Concurs

BUSSEY, Judge: Specially Concurring

Finding no error warranting reversal or modification, I agree that the judgment and sentence should be affirmed.

PARKS, P.J., Specially Concurring:

I agree with all that my brother Judge Brett has stated in this opinion. However, I write separately to consider whether the sentence of death in this case "is excessive or disproportionate . . . , considering both the crime and defendant." This consideration is missing from the Court's opinion. 87 O.S.1981, § 701.13(C).

Although our Legislature has revised this statute somewhat in 1985 Okla. Sess. Laws, Ch. 265, now codified at 21 O.S. Supp. 1985, § 201.13, I believe application of this revision to cases pending on appeal at the time the law was enacted would render the new provision an *ex post facto* law. See *Green v. State*, 713 P.2d 1032, 1041 n. 4 (Okl.Cr. 1985). Nevertheless, I have personally compared the sentence imposed herein with those previous cases either affirmed¹ or modified² by this Court, and find the sentence to be proper.

¹ *Ross v. State*, — P.2d — (Okl.Cr. 1986) *Foster v. State*, — P.2d — (Okl.Cr. 1986) *Green v. State*, 713 P.2d 1032 (Okl.Cr. 1986) *Liles v. State*, 702 P.2d 1025 (Okl.Cr. 1985); *Cooks v. State*, 699 P.2d 653 (Okl.Cr. 1985); *Banks v. State*, 201 P.2d 418 (Okl.Cr. 1985); *Cartwright v. State*, 695 P.2d 548 (Okl.Cr. 1985); *Brogie v. State*, 695 P.2d 538 (Okl.Cr. 1985); *Bowen v. State*, — P.2d —, 55 O.B.J. 2520 (Okl.Cr. 1985); *Stout v. State*, 693 P.2d 617 (Okl.Cr. 1984); and *Nuckols v. State*, 690 P.2d 463 (Okl.Cr. 1984); *Robinson v. State*, 677 P.2d 1080 (Okl.Cr. 1984); *Dutton v. State*, 674 P.2d 1134 (Okl.Cr. 1984); *Stafford v. State*, 669 P.2d 285 (Okl.Cr. 1983); *Coleman v. State*, 668 P.2d 1126 (Okl.Cr. 1983); *Stafford v. State*, 665 P.2d 1205 (Okl.Cr. 1983); *Davis v. State*, 665 P.2d 1186 (Okl.Cr. 1983); *Ake v. State*, 663 P.2d 1 (Okl.Cr. 1983); *Parks v. State*, 651 P.2d 686 (Okl.Cr. 1982); *Jones v. State*, 648 P.2d 1251 (Okl.Cr. 1982); *Hays v. State*, 617 P.2d 223 (Okl.Cr. 1980); and *Chaney v. State*, 612 P.2d 269 (Okl.Cr. 1980), modified on other grounds, *sub nom.*, *Chaney v. Brown*, 730 F.2d 1334 (10th Cir. 1984).

² *Parker v. State*, 713 P.2d 1032 (Okl.Cr. 1985); *Eddings v. State*, 616 P.2d 1159 (Okl.Cr. 1980); as modified, 688 P.2d 342 (Okl.Cr. 1984); *Morgan v. State*, No. F-79-487 (Okl.Cr. No. 14, 1983) (Unpublished); *Johnson v. State*, 665 P.2d 815 (Okl.Cr. 1982); *Glidewell v. State*, 663 P.2d 738 (Okl.Cr. 1983); *Jones v. State*, 660 P.2d 634 (Okl.Cr. 1983); *Driskell v. State*, 659 P.2d 343 (Okl.Cr. 1983); *Boutwell v. State*, 659 P.2d 322 (Okl.Cr. 1983); *Munn v. State*, 658 P.2d 482 (Okl.Cr. 1983); *Odum v. State*, 651 P.2d 703 (Okl.Cr. 1982); *Burrows v. State*, 640 P.2d 533 (Okl.Cr. 1982); *Franks v. State*, 636 P.2d 361 (Okl.Cr. 1981); *Irvin v. State*, 617 P.2d 588 (Okl.Cr. 1980).

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

(Title Omitted in Printing)

ORDER DENYING PETITION FOR REHEARING

On September 18, 1986, the above petitioner filed his petition for rehearing in the above numbered appeal. Petitioner was convicted in the District Court of Grady County, Case No. CRF-83-45, of Murder in the First Degree and was sentenced to death. This Court rendered its opinion on August 29, 1986, affirming the conviction.

NOW THEREFORE, after considering the petition for rehearing and after reviewing the decision of this Court and being fully advised in the premises, this Court finds that the petition for rehearing should be denied.

IT IS THEREFORE THE ORDER OF THIS COURT, that the petition for rehearing shall be DENIED. The Clerk is directed to issue the mandate FORTHWITH.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 24th day of September, 1986.

/s/ Ed Parks
ED PARKS
Presiding Judge

/s/ Tom Brett
TOM BRETT
Judge

/s/ Mez Bussey
MEZ BUSSEY
Judge

ATTEST:

/s/ James Patterson
(Clerk)

SUPREME COURT OF THE UNITED STATES

No. 86-6169

WILLIAM WAYNE THOMPSON,
Petitioner

v.

OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE
COURT OF THE STATE OF OKLAHOMA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 23, 1987

5
No. 86-6169

Supreme Court
FILE

MAY 15

JOSEPH F. SPAN
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON, *Petitioner*,

v.

STATE OF OKLAHOMA, *Respondent*.

On Writ Of Certiorari To The Court Of Criminal Appeals
Of The State Of Oklahoma

BRIEF OF PETITIONER

HARRY F. TEPKER, JR.*
(Appointed By This Court)

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QUESTIONS PRESENTED**I**

In a capital case against a sixteen year old defendant, the trial court admitted into evidence two gruesome photographs of the murder victim. The Court of Appeals stated that admitting the "ghastly, color" photographs into evidence was error that served no purpose other than to inflame the jury, but found that the error was harmless because evidence of the defendant's guilt was so strong. The first question presented is:

May the admission of inflammatory evidence in a capital case against a sixteen year old defendant be deemed harmless error merely because of strong evidence of guilt, when such evidence also prejudices the defendant's right to fair, full jury consideration of all mitigating circumstances—including age—during death penalty deliberations?

II

The second question presented is:

Whether the infliction of the death penalty on an individual who was a child of fifteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States?

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals is published as *Thompson v. State* at 724 P.2d 780. The opinion is reproduced in the Joint Appendix.

Although there is no formal or reported trial court opinion, the Judgment and Sentence on Conviction filed in the District Court of Grady County is set forth in the Joint Appendix. [JA 34-35, R. 512]

Also, set forth in the Joint Appendix is the Certification Order, in which the District Court of Grady County decided to hold petitioner accountable as if he were an adult under 10 Okla. Stat. § 1112 [JA 5-8], and the Order of the Oklahoma Court of Criminal Appeals Affirming Certification. [JA 32-33, R. 510-11].

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. § 1257(3). The opinion of the Court of Criminal Appeals was entered on August 29, 1986. The Court of Criminal Appeals denied a timely petition for rehearing on September 24, 1986. On November 18, 1986, Mr. Justice White entered an order extending the time for petitioning for a writ of certiorari up to and including December 23, 1986. This Court granted the petition for writ of certiorari on February 23, 1987.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const., Amend. XIV (excerpt):

"No State shall . . . deprive any person of life . . . without due process of law . . ."

STATEMENT OF CASE

William Wayne Thompson was convicted and sentenced to die for a murder committed while he was still fifteen years of age and a child under the laws of Oklahoma.

Certification Proceedings

In 10 Okla. Stat. § 1101, the term "child" is defined as "any person under the age of eighteen (18) years, except any person sixteen (16) or seventeen (17) years of age who is charged with murder" and certain other specified offenses.¹ A person who is sixteen or seventeen and who is charged with murder is automatically considered to be adult, unless the person successfully moves to be certified as a child. 10 Okla. Stat. § 1104.2. This "automatic" certification was *not* the basis for trying the defendant in this case in criminal court.

In this case, the trial court decided to hold Wayne Thompson accountable in criminal proceedings "as if he were an adult" under a separate statute. 10 Okla. Stat. § 1112(b). This statute allows a child of any age who is charged with an offense that would be a felony if committed by an adult to be tried in criminal court. *Id.* (i) the state can establish "the prosecutive merit" of the case, and (ii) if the court certifies "that such child shall be held accountable for its [sic] acts as if he were an adult." This certification may occur only after the court has examined whether there are "prospects for reasonable rehabilitation of the child within the juvenile system."

The state initiated a proceeding pursuant to 10 Okla. Stat. § 1112(b). Petition for Delinquency and Accountability, Case No. JFJ-83-12. [JA 3-4]² The petition asked, in part, that the District Court find that the boy was "competent and had the mental capacity to know and appreciate the wrongfulness of his . . . act." [JA 4].

After a hearing on whether the case had prosecutive merit on March 29, 1983, the District Court found probable cause to believe that the defendant had committed first degree murder.

¹ Pertinent statutes, including 10 Okla. Stat. § 1101, are included in Appendix A to this brief.

² References to the Record on Appeal are designated [R. ____]. Citations to the transcript of the petitioner's trial are designated [Tr. ____]. References to the Joint Appendix are [JA ____].

On April 21, 1983, the District Court held an "amenability" hearing. On the same day as this hearing, the District Court filed a Certification Order. [JA 5-8] The court found:

- (i) The boy was accused of "a very serious offense to the community" that had been "committed in an aggressive, violent, premeditated and willful manner." [JA 5]
- (ii) The alleged offense was against a person. [JA 5]
- (iii) The boy did not have a high I.Q., but he "knows right from wrong and understands the consequences of his actions and . . . he just doesn't care." The boy "has the sophistication and maturity necessary to understand and appreciate the wrongful nature of his actions." [JA 6]
- (iv) The boy's record included nine prior arrests. He had previously received counseling and had once been adjudicated a delinquent child, before being placed on probation. [JA 6]
- (v) "This juvenile is not amenable to any rehabilitation efforts as long as he remains in the juvenile justice system." This finding was based, in part, on testimony of witnesses from the Oklahoma Department of Human Services, who "could offer no possible placement within the Department with any services that hold out any reasonable prospect for rehabilitation of this juvenile." [JA 6-7]
- (vi) The offense did not occur while the juvenile was escaping from an institution for delinquent children. [JA 7]

On the basis of these findings, the trial court decided that William Wayne Thompson should be held accountable for his acts "as if he were an adult." *Id.*

Trial

Wayne Thompson was tried between December 4 and December 9, 1983 in the District Court of Grady County, Oklahoma for the murder of Charles Keene. [JA 1-2]

A. Evidence Of Motive

The only apparent motive for Keene's murder, according to evidence presented by both prosecution and defense, was the

Thompson-Mann family's anger over Keene's repeated abuse of his former wife, Vicky Keene, sister of defendants Anthony Mann and Wayne Thompson.

On the afternoon of January 22, Anthony Mann, Danny Mann, and Vicky Keene visited Charles Keene at his former wife's trailer in order "to talk some sense into Charles." In Mrs. Keene's words, they were "trying to talk him into leaving . . . [to] get out of our lives." They had no success. [Tr. 588-89, 715] According to testimony of Mrs. Keene and Danny Mann, Charles Keene was "messed up" from paint sniffing. [Tr. 588, 716] When Vicky Keene asked Charles Keene for her car keys so that he could not take her car away, [Tr. 589] Charles said the keys were in the car.

While Mrs. Keene looked, in Danny Mann's words, "we said 'Charles, you're going to give us the keys or we're going to get them from you.' So we started kind of easing forward toward him . . ." [Tr. 717] Keene grabbed a knife, which Anthony Mann knocked from his hand. [Tr. 717] The two men grabbed Keene, held and searched him, took the car keys and were leaving when Keene again picked up the knife and tried to stab Danny Mann. [Tr. 717] Mrs. Keene observed her brothers running out of the trailer. She also saw Keene, butcher knife in hand, before he closed the trailer door. [Tr. 589-90] The Manns and Mrs. Keene then reported the incident to the local sheriff, but they were told that nothing could be done. [Tr. 590]

The trailer incident was one of many episodes in a violent and tragic matrimonial conflict between the Keenes. The two were married for seven years, but had been divorced approximately two years before Keene's death. When called as a prosecution witness at the defendant's trial, Mrs. Keene stated that being married to and living with Charles was a nightmare. [Tr. 610] Despite the divorce and despite her wishes, he often stayed in his ex-wife's home.³ When she "would call the law out there[,]

³ Mrs. Keene admitted that she deliberately had a child by her ex-husband. She stated that she wanted a child, but that she felt fearful if

they wouldn't do nothing" about Keene's presence. [Tr. 591; *see also* Tr. 622-23] Mrs. Keene said that Keene had beaten her many times [Tr. 611] and had shot at her. [Tr. 611]⁴

Wayne Thompson did not testify at his trial, but the record suggests additional reasons for his rage at Keene. According to the report of Dr. Helen Klein, a clinical psychologist who testified for the prosecution, the boy "described Charles Keene, his deceased brother-in-law, as an 'unemployed glue sniffer,' who 'beat up on me all the time . . . when I was younger he kicked me.'" [R.488] Keene also started the boy "sniffing" paint. [Tr. 612, 694-95]

B. The Murder Of Charles Keene

On the evening of January 22, Anthony Mann (age twenty-seven), Richard Jones (age twenty-four), Bobby Joe Glass (age nineteen) and Thompson left the home of Dorothy Thompson, the boy's mother. [Tr. 631-32] Before leaving, Thompson told his girl friend that "we're going to kill Charles." [Tr. 685]

In the early morning of January 23, Malcolm "Possum" Brown and his wife, Lucille, were awakened in their home by the sound of a gunshot. [Tr. 469, 484, 494] Then, someone pounded on their front door shouting: "Possum, open the door, let me in. They're going to kill me." [Tr. 469, 494] Brown went to the front door, looked out, and saw four men beating another man. [Tr. 471, 474] Brown also heard one of the assailants say, "[t]his is for the way you treated our sister." [Tr. 475-76] While

she had a child by another man. [Tr. 591]

Mrs. Keene supported her family without Keene's help [Tr. 601, 610]; he had not worked for the last three or four years prior to his death. [Tr. 610] Aggravating the conflict, Keene had taken their six year old child to Texas. She moved to Texas to try to get the child back. [Tr. 613]

⁴ As a result, Anthony Mann had given her his gun for her protection. After the incident on the afternoon of January 22, she bought shells for the gun. [Tr. 600] The gun and shells were used that night to kill Keene.

Brown spoke with police on the telephone, the men took the victim away in a car. [Tr. 477, 498]

Several hours after leaving home, Thompson and the three men returned to Dorothy Thompson's house. [Tr. 686] The boy was wet from the chest down. He was visibly shaken and was crying. [Tr. 568, 686-87] Charlotte Mann, the former wife of Anthony Mann, observed him at this time. The boy's mother was hugging him and trying to calm him. In Mann's words, "he told Dorothy [his mother] that he killed him. Charles was dead and Vicky didn't have to worry about him anymore." [Tr. 568] He told his girl friend that they had killed Keene and thrown his body into the river. [Tr. 687-88] Later, apparently after the boy had changed clothes, he was still upset and crying. [Tr. 511-12]

At trial, the prosecution introduced evidence of other fragmentary accounts of the crime. [Tr. 508-512, 521-25, 567-68, 574-76, 634-35] According to Mann's statements to his ex-wife, Charlotte, "they went . . . to Vicky's house and got Charles and they went in and told him to pack his suitcase[,] that they were taking him to the highway because he was leaving. . . . Charles left with them and they ended up at Possum Brown's house and Charles got out and ran and they chased him . . ." [Tr. 574; *see also* Tr. 522] The gun went off during Keene's attempt to escape, but Keene was not shot at the Browns'. [Tr. 522, 574-75] After the beating described by the Browns, the four took Keene to another location on the Washita River. [Tr. 574-75] There, Keene was shot twice—once by Thompson, once by Glass. [Tr. 521-22, 574-75] Afterwards, according to Glass' admissions, Thompson cut Keene "so the fish could eat his body." [Tr. 521] Jones and Thompson then threw Keene's body into the river. [Tr. 522]

C. Photographs And Medical Evidence

Dr. Fred Jordon, chief medical examiner for Oklahoma, testified that the victim had been beaten, shot twice and that his throat, chest and abdomen had been cut. [Tr. 661-62, 667-69]

In addition to the medical examiner's testimony, the court overruled defense objections and allowed introduction of two

color photographs of the victim's remains, which had been in the Washita River for almost one month. [Tr. 627-30] Indeed, during the prosecution's opening statement, the district attorney gave the jury a preview of what they would see:

You're going to see photographs and you're going to see pictures of the entire recovery scene. You're going to see Charles Keene as he's pulled out of that river. He's covered with mud. You're going to see the officers and Dr. Crowell who was the initial medical examiner there on the shore of the Washita. He'll tell you . . . [t]hat Charles Keene had what appeared to be a larva type substance, maggots, larva coming out of his body.

[Tr. 362]

D. Penalty Phase

In the sentencing phase, the State sought a death penalty based on two alleged aggravating circumstances:

- (1) "The murder was especially heinous, atrocious or cruel"; and
- (2) "The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." [JA 12, R. 88]

1. Prosecutor's Use Of Photographs

In an opening statement during the penalty phase, the prosecuting attorney said that the State would rely upon evidence introduced during the guilt phase to show that the murder was especially heinous, atrocious and cruel. [Tr. 774-75] Thus, the color photographs of the victim's remains were also presented to the jury during the penalty phase of trial.

Since the jury had not requested to see the photographs while deliberating on guilt, the prosecutor complained in closing argument during the penalty phase:

[T]here is something in this case that I want to tell you in the very beginning, I did not show you the photographs, you did not ask that the photographs of Charles Keene, the physical evidence be produced to you upstairs in the jury

room in the first phase of this trial. I didn't, but you've got to ask for these exhibits to have them brought up to that jury room.

[Tr. 848] Later, the prosecutor placed the photographs on the podium in front of the jury and for five or ten minutes waved them in front of the jurors. [Tr. 857] The judge overruled the defense counsel's objection, but warned the prosecutor to stop waving the pictures in front of the jury. After a detailed and graphic description of the crime with the aid of the inflammatory photographs, the prosecutor closed: "Its not the sixteen year old, folks, that can do that." [Tr. 865]

2. State's Evidence And Argument To Show Probability Of Future Acts Of Violence

In its attempt to show that the boy would commit more violent acts, the state relied on evidence of his reputation in the community, his arrest record, his failure in one juvenile rehabilitation program, and the opinion of Dr. Helen Klein, a clinical psychologist. After summarizing the boy's arrest record, Klein characterized him as "physically aggressive" and "a bully, an anti-social person." [Tr. 780] She expressed her view that the boy "will . . . become a hardened criminal" and "will become more violent" if he just goes to prison. [Tr. 783-84]⁵

A far different description of the boy had emerged from Dr. Klein's psychological report, which was apparently used by the District Court during certification proceedings. [JA 6, 7] The trial judge attached it to his sentencing report. [R. 487-91]

During the initial stage of the interview, he attempted to portray himself as macho, tough and cavalier. This facade

⁵ Apparently, Dr. Klein's pessimism was based, at least in part, on her assessment of Oklahoma prisons. On cross-examination, Dr. Klein responded to defense counsel's suggestion that "every modern prison" gives psychological help to inmates. She responded: "I'd have to know how you define a modern prison. I know that in the State of Oklahoma there is very little psychological services available, or psychiatric for that matter." [Tr. 784]

tended to dissipate as his anxiety abated.

* * *

Wayne is the sixth of eight children, his father is a truck driver and his mother a housewife. Wayne said he was in special education classes and had entered the 10th grade before dropping out of school in the fall of 1982. Wayne said he had sniffed paint for approximately seven months last year, but quit of his own volition.

* * *

Individuals who obtain MMPI [Minnesota Multiphasic Personality Inventory] profiles similar to Wayne's typically are described as hyperactive, restless and indecisive, and as persons who may keep people at a distance (emotional alienation) and show poor social judgment. A profile such as that obtained by Wayne must be interpreted with caution as it suggests the possible effect of a response set which may have led to exaggeration or distortion of his current status. Such a profile reveals the possible presence of a desire to appear independent of social ties and to "fake bad," i.e., to exaggerate symptomatology.

Rorschach test data support the MMPI data in that test results are indicative of a person whose entire focus is external. He is excitable, hostile, and is responsive to the external world to the extent he cannot organize his inner experience. He has a stereotypical, concrete view of the world and demonstrates little ability to organize or to conceptualize his experience beyond that. Wayne does not have enough ego to handle or to control his impulses and therefore tends to act them out.

[R. 487-91]

E. Jury Instructions

While deliberating over whether the defendant was guilty, the jury had sent the judge a note which asked: "Has the Defendant been certified as an adult?" The trial court answered "[y]es," without distinguishing between the question asked by the jury—whether the boy had "been certified as an adult"—and the actual certification order, which provided only that he should be held accountable "*as if* he were an adult." (Emphasis supplied) [JA 16]

In the penalty phase, after the jury was instructed that it could not fix the defendant's punishment at death unless it first found that one or more aggravating factors was present, [JA 22] the trial judge discussed mitigating circumstances. Instruction No. 7 stated:

Mitigating circumstances are those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.

[JA 23] Instruction No. 8 then reminded the jury that "[e]vidence has been offered as to . . . [t]he existence of youthfulness of the defendant." [JA 24] The trial court's jury instructions during the penalty phase did not state that the defendant's age was a mitigating factor.

After the jury started deliberations in the penalty phase, it sent a question to the trial judge: "Please define mitigating." The answer of the judge was: "You have your instructions, please continue deliberation." [JA 28, Tr. 866] Later, the jury sent a second note asking whether defendant would be eligible for parole if sentenced to life imprisonment. The judge answered: "That is an executive decision, not judicial. You have your instructions." [JA 29, Tr. 866-67]

F. The Death Sentence

The jury fixed defendant's sentence at death on the basis of a single aggravating circumstance—that the crime was "especially heinous, atrocious or cruel." The jury was unpersuaded by the prosecutor's arguments that the boy could not be rehabilitated. It declined to accept the prosecutor's additional claim that the boy would commit violent criminal acts in the future. [JA 30, Tr. 870]

Order Of The Court Of Criminal Appeals Affirming Certification

The Court of Criminal Appeals affirmed the certification of this boy to stand trial as if he were an adult on January 13, over one month after his conviction and death sentence. [JA 32-33]

The Judgment Of The Court Of Criminal Appeals Of Oklahoma

The Court of Criminal Appeals affirmed the judgment and sentence. The admission of the "ghastly, color photographs with so little probative value" was found to be harmless error because evidence of the boy's guilt was "so strong." 724 P.2d at 782-83.

The Court of Criminal Appeals briefly addressed the defendant's argument "that the execution of William Wayne Thompson, who was fifteen at the time of the offense, would constitute cruel and/or unusual punishment." *Id.* at 784. The entirety of the appellate court's discussion of this important and complex issue is as follows:

The same arguments now made by appellant were made by appellate counsel in *Eddings v. State*, 616 P.2d 1159 (Okla. Cr. 1980). This Court, unanimously rejecting the arguments, found that imposition of the death penalty on a minor certified to stand trial as an adult constitutes neither cruel nor unusual punishment. . . .

The United States Supreme Court granted certiorari on the issue, . . . but then decided the case on another ground. *Eddings v. Oklahoma*[.] Upon reconsideration of the issue, we reaffirm our previous holding that once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult.

Id. (citations omitted).

SUMMARY OF ARGUMENT

I

Although the traditions of Anglo-American jurisprudence allow capital punishment in many cases, imposing the death sentence for a crime committed by a fifteen year old boy, a child under state law, violates the Eighth and Fourteenth Amendments.

Condemning a child or adolescent to death serves no legitimate penological purpose. No evidence suggests that the remote prospect of a death sentence for a child or adolescent is

a greater deterrent than long-term imprisonment. Even an improbable death penalty may attract a few self-destructive or death-defying juveniles to commit capital crimes. Furthermore, imprisonment is more than adequate retribution and incapacitation for the crime of a fifteen year old. Of course, a sentence of death also denies a child or adolescent the right to life, the chance to grow, and all possibility of rehabilitation.

The death penalty for a fifteen year old violates contemporary standards of decency. Juvenile executions have always been rare. In part, this fact reflects the long-standing view that children must be treated and judged differently. The explanations for this special treatment are many and persuasive. Children are less mature, more impulsive, and more self-destructive. The harshest punishments are not appropriate for transgressing children and adolescents, whose crimes are often the result of victimization, abuse, and neglect. And so, even criminal law reflects the understanding that "[c]hildren have a very special place in life." *Eddings v. Oklahoma*, 455 U.S. 104, 116 n. 12 (1982) (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)). The law is tenacious in its belief that children and adolescents are less responsible for their actions and in its hope that offending children will be rehabilitated. This Court has held consistently that even youthful offenders who commit capital crimes deserve the special consideration required by this tradition.

An increasing number of states have established minimum ages for imposition of capital punishment. No state that has decided to establish an explicit minimum age by statute has selected an age younger than sixteen. Likewise, contemporary jury sentencing patterns reflect an extreme reluctance to sentence children to death, even when authorized by law. To paraphrase Justice Stewart, in this era death sentences for juveniles are cruel and unusual in the same way that being struck by lightning is cruel and unusual. *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

The State of Oklahoma, however, is uncommonly reluctant to respect these principles when an adolescent is accused of an

intentional homicide and a prosecuting attorney asks for the death penalty. Oklahoma neither prohibits the capital punishment of children below a certain age nor establishes procedures to assure that the "relevant mitigating factor" of youth, *Eddings*, 455 U.S. at 116, is carefully considered prior to a death sentence.

Oklahoma's disregard of children's "very special place" in a death penalty scheme is tragically evident in the instant case. First, the court certifying Wayne Thompson to stand trial as if he were an adult did not assess his moral guilt in light of the mitigating factor of age. The emphasis in the certification process was on the seriousness of the allegations, the boy's sanity, and the capabilities of Oklahoma's juvenile system, not the boy's character and personal culpability for the murder. Second, the reliability of the jury's decision to sentence the boy to die was undermined by illegitimate prosecutorial tactics designed to distract the jury from its duty to consider carefully the mitigating factor of youth, and by jury instructions that failed to inform the jury that youth was a mitigating factor of great weight. Indeed, the jury was instructed erroneously that the boy had been certified to *be* an adult and that the jurors were free to decide for themselves what might be considered as a mitigating factor.

In sum, this Court has consistently adhered to the principle that the age of the defendant "bear[s] directly on the fundamental justice of imposing capital punishment." *Skipper v. South Carolina*, ___ U.S. ___, 106 S.Ct. 1669, 1676 (1986) (Powell, J., joined by Burger, C.J. and Rehnquist, J., concurring). Because Oklahoma continues to disregard this elemental principle of justice for the young, this Court must vacate the death sentence in this case.

II

By placing extraordinary emphasis upon gruesome photographs of the victim during the sentencing phase of the boy's trial, the prosecutor so riveted the jury's attention to the method of the murder and the effects of post-mortem decay

that he effectively distracted the jury from giving fair, full consideration to the youth and the character of the boy. As a result, there is a great and intolerable danger that the death sentence was imposed without "constitutionally indispensable," "particularized consideration," *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), of the boy's youth, character and record.

Although the Oklahoma Court of Criminal Appeals was required by statute to decide whether the death sentence was the result of passion or prejudice, the court did not even consider the effect of inflammatory, gruesome photographs of the murder victim's remains used repeatedly by the prosecutor during the sentencing phase. The appellate court condemned the prosecutor's actions and held that the trial court's decision to allow the inflammatory evidence was error. Still, the appellate court upheld the defendant's conviction and death sentence, without considering how the error clearly prejudiced the boy's right to a reliable sentencing determination.

III

As this case demonstrates, the tradition of special treatment of child offenders can be difficult to maintain. Juries influenced by emotion, improper prosecutorial conduct, and the intrinsically appalling nature of murder occasionally fail to give fair, full consideration to the mitigating factor of age. This Court must protect even children who have committed capital crimes from a death penalty all too easily and yet freakishly imposed.

ARGUMENT

I

THE EXECUTION OF A PERSON WHO WAS A CHILD OF FIFTEEN AT THE TIME OF THE CRIME IS CRUEL AND UNUSUAL PUNISHMENT.

Wayne Thompson's death sentence offends the Eighth and Fourteenth Amendments because his execution would be cruel and unusual punishment. There are broad and narrow grounds

for this conclusion, but the common feature of petitioner's Eighth Amendment arguments is his youth.

First, the death sentence was imposed for a crime committed when the boy was fifteen years of age. The death sentence is unconstitutional for this reason alone. As the Court has explained, a punishment is cruel and unusual if:

(i) "[I]t . . . makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering," *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion of White, J.); or

(ii) The punishment "is grossly out of proportion to the severity of the crime," *id.*, or the individual's personal, "moral guilt" for that crime, *Enmund v. Florida*, 458 U.S. 782, 800 (1982).

The application of the Eighth Amendment ultimately requires this Court to render its own judgment, *id.* at 797, but its decision "should be informed by objective factors to the maximum possible extent." *Id.* at 788 (quoting *Coker*, 433 U.S. at 592 (plurality opinion of White, J.)). Thus, when this Court examines whether a punishment is excessive or harsh in light of society's "evolving standards of decency," *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), it looks to such factors as history and precedent, legislative judgments, international opinion and juries' sentencing decisions. *Enmund*, 458 U.S. at 788.

Wayne Thompson's death sentence also offends the Eighth Amendment on narrower grounds. When examining whether punishment of a particular individual violates the Eighth Amendment, this Court insists that a death sentence be based on a careful assessment of moral guilt. "While the States generally have wide discretion in deciding how much retribution to exact in a given case, the death penalty, 'unique in its severity and irrevocability,' . . . requires the State to inquire into the relevant facets of 'the character and record of the individual offender.'" *Tison v. Arizona*, ___ U.S. ___, 55 U.S.L.W.

4496, 4499 (Apr. 21, 1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) and *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). Oklahoma did not fulfill this constitutional duty to assess carefully moral guilt in light of mitigating factors, particularly the boy's youth.

A. Condemnation Of Children Makes No Measurable Contribution to Legitimate Goals Of Punishment.

"There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death." *Spaziano v. Florida*, 468 U.S. 447, 460 n.7 (1984). In general, the state may punish offenders to achieve one or more of four objectives:

- (1) [T]o rehabilitate the offender; (2) to incapacitate him from committing offenses in the future; (3) to deter others from committing offenses; or (4) to assuage the victim's or the community's desire for revenge or retribution.

Spaziano v. Florida, 468 U.S. at 477-78 (Stevens, J., dissenting). See also, e.g., *Gregg v. Georgia*, 428 U.S. at 183 (Stewart, J., plurality opinion).

1. Retribution Is Not A Valid Penological Goal For The Execution Of Children And Adolescents.

As this Court stated in *Spaziano v. Florida*, 468 U.S. 447, 462 (1984): "[R]etribution clearly plays a more prominent role in a capital case." Retribution is a legitimate goal of the state because there is a societal need for "particularly offensive conduct" to be met with the punishment that it "deserves." *Gregg v. Georgia*, 428 U.S. at 183 (plurality opinion). "The instinct for retribution is part of the nature of man." *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring). However, retribution justifies an execution only if a defendant's culpability is of the highest degree. "[I]n the final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of what we called in *Enmund* the 'moral guilt' of the defendant." *Spaziano v. Florida*, 468 U.S. at 481

(Stevens, J., dissenting) (citing *Enmund*, 458 U.S. at 800-01). See also *Tison v. Arizona*, 55 U.S.L.W. at 4499-50.

Although the execution of an adult for retribution is constitutionally permissible, this justification for the death penalty loses all legitimacy when the object of capital punishment is a child or adolescent. Juveniles do not "deserve" the harshest punishments in the same way that mature, responsible adults might. Those who kill are not held personally responsible for murder unless they are deemed to have the capacity to function as moral beings, who can evaluate their behavior in light of socially accepted values. Only those who are deemed to act out of a fully developed moral awareness, and who choose to act at odds with morality, are deemed "deserving" of the full measure of punishment allowed by law. See *Enmund*, 458 U.S. at 800-01.

Adolescents are not yet fully operational moral beings even though the capacity to form moral standards to guide behavior begins to emerge in adolescence. "[L]arge groups of moral concepts and ways of thought only attain meaning at successively advanced ages and require the extensive background of social experience and cognitive growth represented by the age factor." Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 *Vita humana* 11, 30 (1963). While struggling to establish their own identity, adolescents are still significantly dependent upon their parents for support and approval. E. Erickson, *Childhood and Society* 261-63 (2d ed. 1963). See generally E. Erickson, *Identity: Youth and Crisis* (1968); P. Mussen, J. Conger & J. Kagan, *Child Development and Personality* (5th ed. 1979). Like younger children, adolescents are so profoundly dependent upon their parents and families to define morally appropriate boundaries for their behavior, D. Offer & J. Offer, *From teenage to young manhood: A psychological study* (1975), that they cannot be regarded as morally culpable for homicidal behavior to the same degree as adults. Adolescents are also susceptible to the suggestions of others—particularly peers. E. Erickson, *Childhood and Society* 261-63 (2d ed. 1963). Adolescence is a

period characterized by impulsive, thoughtless behavior often evoked by strong emotion. Indeed, the only psychological evidence in the record—prepared by the state's witness, Dr. Helen Klein—portrays Wayne Thompson as “hyperactive,” “restless,” “desir[ing] to appear independent of social ties and to ‘fake bad,’” “responsive to the external world,” unable “to organize his inner experience,” and lacking “ego . . . to control his impulses.” [R. 487-91] This portrait of a troubled boy could be that of many other adolescents. It is also far different than the image drawn by the prosecutor, who was so intent on denying the reality and meaning of Wayne Thompson's youth.

Thus, the emerging ability of adolescents to act out of a fully developed moral awareness is continually under assault. Adolescents' crimes are more often the products of powerful desires to please others or of sudden strong impulses; these crimes are less likely to be the result of coldly deliberate, thoughtful decisions to violate the known moral precepts of society.⁶ For these reasons, adolescents do not deserve death as punishment: They simply are not personally responsible for their homicidal behavior in the sense that *Enmund* and *Tison* require. Children and adolescents by their nature deserve understanding and treatment—or at least the chance to grow—rather than the revenge of an outraged society anxious to “kill them back.”

2. The Remote Possibility Of Dying For A Crime Is Not Likely To Deter A Young Offender, If The More Likely Prospect Of Long Term Imprisonment Has Already Failed As A Deterrent.

As this Court indicated in *Gregg v. Georgia*, evidence that the prospect of capital punishment deters capital crimes is

⁶ On the characteristics and background of homicidal adolescents, see generally Cornell, Benedek & Benedek, *Characteristics of Adolescents Charged with Homicide: Review of 72 Cases*, 5 Behavioral Sciences & the Law 11 (1987); C. Keith (ed.), *The Aggressive Adolescent: Clinical Perspectives* (1984); M. Rutter & H. Giller, *Juvenile Delinquency: Trends and Perspectives* (1983).

inconclusive. Writing for the plurality, Justice Stewart found “no convincing empirical evidence either supporting or refuting this view.” 428 U.S. at 185. Nevertheless, he wrote:

We may . . . assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.

Id. at 185-86 (Stewart, J., plurality opinion). Of course, deterrence is logical, but logic only works for those cold, calculating individuals who do not act out of passion or impulse. Adolescents are particularly unlikely to fit this category. They are going through “the period of great instability which the crisis of adolescence produces.” *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion). Juveniles “generally are less mature and responsible than adults.” *Eddings v. Oklahoma*, 455 U.S. at 115-16 (footnote omitted). Adolescents tend to “live for today” with little thought of the future consequences of their actions. See, e.g., Kastenbaum, “Time and Death in Adolescence,” in *The Meaning of Death* 99 (H. Feifel ed. 1959). “[A]dolescents may have less capacity to control their conduct and to think in long range terms than adults.” *Eddings*, 455 U.S. at 115 n. 11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)). Adolescents are in a developmental stage when defiance of danger and death is often not controlled by a sense of mortality. The young are attracted to—not deterred from—flirtations with death because of an immature feeling of omnipotence. Fredlund, *Children and Death from the School Setting Viewpoint*, 47 J. School Health 533 (1977); Miller, “Adolescent Suicide: Etiology and Treatment,” in 9 *Adolescent Psychiatry* 327 (S. Feinstein, J. Looney, A. Schwartzberg & A. Sorosky eds. 1981). One of the problems with juvenile behavior is not that the juveniles are cold, calculating and careful in these judgments; it is that they have no judgment at

all, *Parham v. J.R.*, 442 U.S. 584, 603 (1979), at least in the sense of considering the consequence of their behavior and deciding to proceed nevertheless. Irwin & Millstein, *Biopsychological Correlates of Risk-Taking Behaviors during Adolescence*, 7 J. of Adolescent Health Care 82S (Nov. 1986 Supp.). This absence of judgment derives from the adolescents' limited experience and lack of ability to calculate future consequences. The results are often tragic: Alcohol and drug abuse, reckless driving, sexual experimentation, and other self-destructive conduct. *Id.* "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion).

This generally accepted view of typical adolescent behavior leads to the conclusion that juveniles do not commonly engage in any "cold calculus that precedes the decision to act." *Gregg v. Georgia*, 428 U.S. at 186 (Stewart, J., plurality opinion). Thus, this Court's premises underlying an assumed general deterrence of the death penalty do not apply in any reasonable manner to adolescents.

3. The Capacity Of The Young For Change, Growth And Rehabilitation Makes The Death Penalty Particularly Harsh And Inappropriate.

The death penalty totally rejects the one sentencing goal normally thought most appropriate for young offenders—rehabilitation. See, e.g., *People v. Hiemel*, 49 A.D.2d 769, 770, 372 N.Y.S.2d 730, 731 (1975). Execution abandons and denies the promise of adolescence—that the impulsive, antisocial acts of teenagers will naturally moderate as they become adults. Killing children and adolescents for their crimes offends the fundamental premises of juvenile justice:

[I]ncorrigibility is inconsistent with youth; . . . it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life.

Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968).

Likewise, the goal of incapacitation or specific deterrence does not justify capital punishment of juvenile offenders. Unlike deterrence and retribution, "incapacitation has never been embraced as a sufficient justification for the death penalty." *Spaziano v. Florida*, 468 U.S. at 461. Long-term imprisonment of young offenders affords society comparable protection against their possible future crimes.

Juvenile murderers tend to be model prisoners and have very low rates of recidivism when released. D. Hamperian, *The Violent Few* 52 (1978); T. Sellin, *The Death Penalty* 102-20 (1982). Cf. Vitello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States*, 26 DePaul L. Rev. 23, 32-34 (1976).

Moreover, as adolescents grow into adults, they generally leave behind criminality. F. Zimring, "Background Paper," in Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 37 (1978). Crime statistics reveal that as people move from the turbulence of adolescence to the calmer period of the early twenties, they commit fewer crimes, whether or not they are apprehended or participated in a rehabilitation program. See Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Assessing the Relationship of Adult Criminal Careers to Juvenile Careers: A Summary* 4 (1982); President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 55-56 (1967). Cf. Federal Bureau of Investigation, U.S. Dept. of Justice, *Crime in the United States: 1978* 194-96 (1979); Zimring, "American Youth Violence: Issues and Trends" in *Crime and Justice: An Annual Review of Research* 67 (Morris & Tonry eds. 1979) (rates of many kinds of criminality peak in mid-adolescence).

The character development which continues to take place during adolescence, until eighteen years of age, can very well overcome features of an antisocial personality that appear during adolescence. For this reason, the diagnosis of Antisocial

Personality Disorder cannot be made until a person has reached eighteen years of age.

Since [the typical childhood signs of Antisocial Personality Disorder] may terminate spontaneously . . . , a diagnosis of Antisocial Personality Disorder should not be made in children; it is reserved for adults (18 or over), who have had time to show the full longitudinal pattern.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 319 (3d ed. 1980). See also Wilson & Herrnstein, *Crime and Human Nature* 144-45 (1985).

B. Condemning Any Fifteen Year Old Child To Death Violates Contemporary Standards Of Decency.

The meaning of the Eighth Amendment's prohibition of cruel and unusual punishment must be drawn "from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. at 101 (plurality opinion). See also *Robinson v. California*, 370 U.S. 660, 666 (1962). The application of this test requires that the Court look to objective factors such as history, legislative judgments, international opinion, and juries' sentencing decisions. *Enmund v. Florida*, 458 U.S. at 788-89.

1. Special Treatment Of Children And Adolescents Is An Important Part Of American Traditions Of Justice.

"Children have a very special place in life which law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) quoted in *Eddings v. Oklahoma*, 455 U.S. at 116 n. 12. Examples of society's decision to treat children differently include limitations on youths' right to vote, contract, sue or be sued, dispose of property by will, marry, accept employment, purchase liquor, and drive vehicles. F. Zimring, *The Changing Legal World of Adolescence* (1982).⁷

⁷ A collection of pertinent examples of Oklahoma statutes that disable juveniles from certain activities—including driving, purchasing cigarettes, resorting to pool halls or bingo parlors—is included in Appendix A to this brief.

The dominant traditions of American law provide that people generally are not fully responsible until age eighteen. This age is the most common age of majority established in American law for noncriminal purposes. For similar reasons, the Twenty-Sixth Amendment establishes the right to vote at age eighteen. It is an irony—or even an irrationality—that children and adolescents are universally considered too immature to judge the criminal responsibility of accused defendants, and thus cannot serve on juries, but they may be subjected to the supreme liability of death for their supposed "responsibility."

That juveniles are less mature and less responsible than adults is a fact that has historically been recognized by this Court. *Bellotti v. Baird*, 443 U.S. at 635 (plurality opinion). "Children, by definition, are not assumed to have the capacity to take care of themselves." *Schall v. Martin*, 467 U.S. 253, 265 (1984). As a result, the actions of adolescents "cannot be judged by the more exacting standards of maturity." *Haley v. Ohio*, 332 U.S. at 599 (plurality opinion).

The development of separate juvenile justice systems in every state manifested a rejection of harsh, adult punishment for the unlawful acts of children. See *Eddings*, 455 U.S. at 116 n. 12; *In Re Gault*, 387 U.S. 1, 15-16 (1967). However, the perception that youths should not be subjected to the harshest punishments was an informal premise of Anglo-American criminal justice well before the development of separate juvenile justice systems. Although statutes did not always explicitly give younger offenders benefit of more lenient punishments, the young did receive *de facto* benefits, such as shorter sentences, special incarceration facilities, community-based sanctions or outright commutation of criminal sentences. See, e.g., Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1187 (1970). All states now set the jurisdictional age limit for their juvenile courts no lower than age sixteen. S. Davis, *Rights of Juveniles: The Juvenile Justice System* app. B (2d ed. 1986).

This Court has explained the reasons for the law's lenient treatment of child offenders in *Eddings*.

[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.

* * *

"Adolescents everywhere, from every walk of life, are often dangerous to themselves and to others." The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 41 (1967) "[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults." . . . Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978).

455 U.S. at 115-16 & n. 11 (footnote omitted).

Special treatment of juvenile offenders is also a reflection of the belief that the young must have time and opportunity to grow—and to escape from the disadvantages, deprivations and abuse that may account for their behavior. This special treatment derives from a prevalent, compassionate and decent sense that government must be restrained from adding undue punishment to whatever pain and handicaps have already been inflicted by fate and circumstance. This sense of restraint parallels the "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, ___ U.S. ___, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). See also *Eddings*, 455 U.S. at 115 n. 11 ("[Y]outh crime as such is not exclusively the offender's fault.") (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)).

2. The Execution Of Juveniles Violates Contemporary Standards Of Decency As Reflected In Legislative Attitudes.

Protection for juveniles under death penalty statutes has increased dramatically in the past quarter century. A 1962 Associated Press survey of legal possibilities in criminal proceedings involving children showed a much harsher legal environment. *New York Times*, Jan. 7, 1962, at 81, col. 1. Of forty-one death penalty states at that time, the minimum age for the death penalty was age seven in sixteen states, age eight in three states, age ten in three states, and ages twelve to eighteen in nineteen states.

The situation today is quite different. Currently, fifteen of thirty-six states retaining the death penalty expressly exclude youths under sixteen, seventeen or eighteen from their death penalty statutes. (Appendix B) Of these fifteen, eleven states establish a minimum age of eighteen; three states set an age seventeen limit, while one state has selected sixteen years as a minimum. No state that expressly establishes a minimum age in death penalty statutes uses an age minimum below sixteen. (Appendix B)

Since 1981, seven states have legislated minimum ages specifically for their death penalty statutes—and all selected age eighteen: Ohio (1981), Nebraska (1982), Tennessee (1984), Colorado (1985), Oregon (1985), New Jersey (1986), and Maryland (1987). Currently, several other states are considering raising the minimum age. *Should A Child Who Kills Be Killed?*, *Washington Post Nat'l. Ed.*, Apr. 13, 1987, at 31.

Twelve other states establish a minimum age limit through either their juvenile court waiver statutes or their statutes giving concurrent or exclusive jurisdiction to criminal court for capital murders committed by offenders of a certain age or older. (Appendix B) Only this year, the Indiana legislature decided to raise their minimum age from ten to sixteen. (Appendix B) The death penalty statutes in an additional six states expressly require the sentencing body to consider, as a mitigating factor, the youth of the offender. (Appendix B)

Another fifteen jurisdictions completely prohibit the death penalty for all offenders.

Thus, forty-eight of fifty-one jurisdictions either prohibit the death penalty for all offenders (including juveniles), establish a minimum age between 16 and 18, prohibit any criminal court jurisdiction over juveniles ages 12 to 16, or require by statute juries and judges to consider youth as a factor mitigating against the death penalty.

Only three states have no legislative provisions for either establishing a minimum age for the death penalty or requiring that youthful age be considered a mitigating factor in the death sentencing decision. Only one of these three states, Oklahoma, currently has any prisoners under a death sentence for a crime committed under age eighteen.

3. An Emerging Consensus Of International Law And Opinion Rejects Juvenile Executions.

Human rights treaties are the most authoritative source of customary international law on the question of juvenile executions. Three major human rights treaties explicitly prohibit juvenile death penalties. Article 6(5) of the International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16) 53, U.N. Doc. A/6316 (1966); Article 4(5) of the American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI/1.1, Doc. 65 Rev. 1 Corr. 1 (1970); and Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. Each of these treaties prohibits the death penalty for crimes committed below the minimum age of eighteen. Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 Cin. L.Rev. 655 (1983) [hereinafter Hartman, *International Norms*].

The United States Government has ratified the Geneva Convention, and has signed but not yet ratified the other two conventions. However, a United Nations General Assembly

Resolution recognized that Article 6 of the International Covenant constitutes a "minimum standard" for all Member States, not only ratifying states. Hartman, *International Norms*, *supra* at 681 n. 94. This resolution was supported by the United States Government. *Id.*

Further evidence of state practice appears in the national laws of over eighty nations, including almost all western European nations. These countries have either abolished the death penalty completely or have forbidden it for certain offenses and certain offenders, such as children and adolescents. Over forty nations which retain the death penalty have statutory provisions exempting youth from capital punishment. Hartman, *International Norms*, *supra* at 666 n. 44. See also Amnesty International, *The Death Penalty* (1979). Since 1979 there have been more than 11,000 executions in over eighty countries, but only eight executions (0.07%) were for crimes committed while under age eighteen. Amnesty International, *The United States of America: The Death Penalty* (Feb. 1987). Three were in the United States, two in Pakistan, and one each in Bangladesh, Rwanda and Barbados. *Id.* There were also undocumented reports of juvenile executions in Iran. *Id.*

Recently, the Inter-American Commission on Human Rights (IACHR) for the Organization of American States (O.A.S.) condemned two juvenile executions in the United States in 1986. O.A.S. IACHR, Res. No. 3/87, Case No. 9647 (United States) (Mar. 27, 1987), OEA/Ser. L/V/II, 69, Doc. 17 (1987).

The Commission finds that in the member states of the O.A.S. there is recognized a norm of *jus cogens* which prohibits the State execution of children. This norm is accepted by all the States of the inter-American system, including the United States.

Id. at para 56. The IACHR agreed with the United States that "there does not now exist a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty," *id.* at para 60, but also stated:

[I]n light of the increasing numbers of States which are ratifying the American Convention on Human Rights and the United Nations Covenant on Political and Civil Rights, and modifying their domestic legislation in conformity with these instruments, the norm [of 18 years] is emerging.

Id.

4. Jury Sentencing Patterns Reflect Popular Reluctance To Sentence Juveniles To Death.

In the years 1982 to 1985, 1,103 death sentences were imposed by juries throughout the United States. Only twenty-nine (2.6%) of these death sentences were imposed on individuals for crimes committed while under the age of eighteen. Jury sentencing practices for fifteen year old offenders are even more striking. Of the 1,103 death sentences imposed from 1982 through 1985, only four (0.4%) have been for crimes committed when the convicted individual was age fifteen or younger. (Appendix G) During this same four year period, 1.8% (1,084 of 60,789) of adults arrested for criminal homicide in the United States received the death sentence, a small portion. A microscopically small portion, only 0.6% (29 out of 5,239), of juveniles (younger than eighteen) arrested for criminal homicide received the death penalty.

Moreover, while the number of juvenile death sentences appears to be declining in recent years, the number of adult death sentences has remained fairly constant at a rate of 250 to 300 per year. (Appendix G) The decline is revealed by the changing populations on death row. As Appendix E indicates, thirty-eight (2.9%) of the 1,289 persons on death row on December 31, 1983, were under juvenile death sentences. During the next three years and three months the total death row population increased by 585 persons but the number of juveniles actually decreased by six. On March 31, 1987, only thirty-two (1.7%) of the 1,874 persons on death row had committed their crimes while under age eighteen. (Appendix F) The drop from thirty-eight to thirty-two juveniles on death row is a 16% decrease in just over three years, a period in which there was a

47% increase (from 1,251 to 1,842) in the adult death row population.⁸

⁸ Jury sentencing patterns appear to reflect public opinion. According to a number of scientific surveys, public opinion opposes execution of juvenile offenders, although it quite strongly supports capital punishment in general. This pattern has existed for some time. In November 1936, a survey showed 61% in favor of capital punishment. 54% opposed the execution of offenders under the age of 21. H. Cantil, *Public Opinion: 1935-1946* (1951). In February 1965, a similar pattern was found by the Gallup Poll: 45% favored capital punishment, but only 23% favored death sentences for persons under the age of twenty-one. Erskine, *The Polls: Capital Punishment*, 34 Pub. Opinion Q. 290 (1970), cited in Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 Stan. L. Rev. 1245, 1250 (1974).

A university research center conducted a telephone poll throughout Georgia in the fall of 1986. Of the 917 Georgians interviewed, 75% favored capital punishment, but only 26% favored death sentences for crimes committed under age eighteen. Thomas & Hutcheson, *Georgia Residents' Attitudes Toward the Death Penalty, the Disposition of Juvenile Offenders, and Related Issues* (December 1986) (unpublished report prepared for the Clearinghouse on Georgia Prisons and Jails by the Center for Public and Urban Research, Georgia State University).

A telephone survey of 509 respondents was conducted across the entire state of Connecticut in May, 1986, with similar results. While 68% favored capital punishment in general, only 31% favored it for crimes committed while under age eighteen. Tuckel & Greenberg, *Capital Punishment in Connecticut* (May 1986) (unpublished report prepared for the Archdiocese of Hartford by The Analysis Group, Inc., New Haven, Connecticut).

If public opinion is an objective indicator of society's standards of decency, then it is clear that the moral consensus supporting capital punishment in general does not extend to the execution of children and adolescents.

C. Execution Of This Person For A Crime Committed At Age Fifteen Would Be Cruel And Unusual Punishment Because The Oklahoma Courts Failed To Give Careful, Particularized Consideration To The Character And Background Of The Accused Boy.

Although the Constitution does not deny government the power to take the lives of those who have committed the most serious of crimes, the supreme law of the land does require care, restraint, fairness and decency in the infliction of the most severe of punishments. The death penalty is special and unique—qualitatively different from all other governmental powers. *Spaziano v. Florida*, 468 U.S. at 468-69 (Stevens, J., dissenting). It is irrevocable: Mistakes cannot be rectified. In a case upholding defendants' convictions and death sentences, Justice Robert Jackson alluded to the law's traditional reluctance and restraint:

When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance.

Stein v. New York, 346 U.S. 156, 196 (1953). There is even greater reason for giving the condemned the benefit of all doubts when the condemned was a fifteen year old boy at the time of the crime.

Even if this Court rules that imposing a death sentence on an adolescent is not invariably cruel and unusual punishment, the execution of Wayne Thompson would still violate the Eighth Amendment on narrow grounds: The courts of Oklahoma failed to assess adequately the fundamental justice of the death penalty in this case because the courts did not give careful, particularized consideration to the boy's youth and moral culpability as required by the Constitution.

Throughout this case, the logic of the Oklahoma courts has been simple. The boy was certified to stand trial as if he were an adult. If he may be tried as if he were an adult, he may be punished as if he were an adult. If adults may be put to death, he may be put to death. This logic, of course, would be equally

applicable to any child certified to stand trial as if he or she were an adult, whether the child was, for example, nine, twelve or, as the boy in this case, fifteen.

This abstract syllogism ignored the command of the Eighth Amendment that a death sentence must "reflect a reasoned moral response to the defendant's background, character and crime." *California v. Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring); yet, it is the only articulated basis for the decision of the Court of Criminal Appeals that the execution of the defendant would not be cruel and unusual punishment. 724 P.2d at 784. Tragically, the appellate court's cursory analysis does illustrate how the trial court arrived at the decision to sentence the defendant to death. Oklahoma courts never reviewed this case in light of this Court's insistence that age bears directly on the fundamental justice of the death penalty. *Skipper v. South Carolina*, ___ U.S. ___, 106 S.Ct. 1669, 1676 (1986) (Powell J., joined by Burger, C.J. and Rehnquist, J., concurring). See also *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

1. The Trial Court Decided To Hold Defendant Accountable Not Because He Was An Adult, But As If He Were An Adult. The Trial Court's Certification, However, Is Not Constitutionally Sufficient Consideration Of Age As A Mitigating Factor.

When the jury experienced some uncertainty or confusion about Wayne Thompson's youth, they asked: "Has the Defendant been certified as an adult?" The trial court answered simply, "yes." This answer was incorrect. It misled the jury into believing that the issue of the defendant's adulthood, his maturity, and his personal culpability had already been determined. Yet, as a matter of Oklahoma law, the defendant had not been adjudged to be an adult. He was "certified" to stand trial "as if he were an adult." 10 Okla. Stat. § 1112(b).

More to the point, during certification proceedings, the boy had not been adjudged to be as responsible or as morally culpable as an adult. Instead, the trial court decided, first, that

he was old enough to appreciate the wrongfulness of his actions and, second, that the prospects for rehabilitation within the juvenile system were low. [JA 5-8] Indeed, the "amenability" inquiry required by 10 Okla. Stat. § 1112(b) is more a prediction about the capacities of Oklahoma's juvenile justice system than it is an assessment of the defendant's moral guilt. The trial judge who certified the defendant wrote:

The witnesses from the Department of Human Services could offer no possible placement within the Department with any services that hold out any reasonable prospect for rehabilitation of this juvenile. The best the Department could do for this juvenile would be to warehouse him until he was 18.

[JA 7] Although such considerations are relevant to a decision whether to waive juvenile court jurisdiction, as the Court of Criminal Appeals held in Eddings' case, *In the Matter of M.E.*, 584 P.2d 1340, 1346 (Okla. Cr. 1978), *cert. denied*, 436 U.S. 921 (1978), such predictions do not bear directly on the fundamental justice of the death penalty.

The issues of his emotional maturity, his personal moral culpability for the murder, and the propriety of the death penalty were not before the court at the time of certification. Having determined that the boy passed Oklahoma's test of sanity and that the murder was premeditated, the certifying court did not examine the boy's personal culpability or "moral guilt," *Enmund v. Florida*, 458 U.S. at 801, for the murder of Charles Keene. The court explored *none* of the issues constitutionally relevant to the personal culpability of this fifteen year old child: What actions were attributable solely to the boy? Why did he participate in the killing? What influence did others, including co-perpetrators and family, have on his participation in the killing? And did he appreciate the wrongfulness of killing Charles Keene (rather than simply the wrongfulness of killing in general)? Plainly, the decision to try the boy in adult criminal court was not—and was not intended to be—a judgment on his moral culpability for purposes of inflicting the supreme penalty. *See Tison v. Arizona, supra*.

2. The Trial Judge Failed To Instruct The Jury That It Must Consider Defendant's Youth As A Relevant Mitigating Factor Of Great Weight.

Despite the warning of this Court in *Eddings v. Oklahoma* that "the chronological age of a minor is itself a relevant mitigating factor of great weight," 455 U.S. at 116, Oklahoma has not changed its statutes to include age as a mitigating factor. Moreover, it has not even developed the practice of requiring the jury to consider youth as a mitigating factor.

In this case, the trial court instructed the jury, erroneously, that the boy was an adult. The trial judge failed to instruct the jury that his youth *must* be considered in mitigation. Worse, the instructions indicated that the jury need *not* consider youth as mitigating: "*The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.*" [JA 23] (emphasis added)⁹

⁹ In addition, from the outset of the trial, the prosecutor, with the tacit approval of the trial judge, discouraged consideration of the boy's youth. Throughout the jury selection process the prosecutor treated the defendant's youth as a factor that should not be considered. He was not always careful to specify that age was irrelevant only to the issue of guilt. Repeatedly the prosecutor asked jurors about this issue: "I'm asking you to think right now about your objectivity in regard to Mr. Thompson's age if it's going to be something that is going to interfere with your deliberation in this case." [Tr. 63] Asking every juror the age of his or her children, the prosecutor sent a message that the jury should not be sympathetic to the boy, and that they might be if their children were as young as he. [Tr. 80] Over and over, in front of the whole venire, the prosecutor asked these questions and made these comments. *See* Tr. 88, 91-92, 100, 103, 106-07, 223-25, 234-35, 265-66, 277-78. At one point the judge actively joined in this questioning. *See* Tr. 205. Through this process, the jurors were conditioned to believe that they should not consider the youthfulness of Wayne Thompson. Even though defense counsel emphasized the boy's youth throughout the jury selection process and the trial, the defense did not disrupt this conditioning process. Defense counsel did not object to the prosecutor's voir dire. Under these circumstances the jury could reasonably have believed that the

In effect, the jury was misinformed that it had complete discretion as to what factors are mitigating. The trial judge did state that evidence had been offered with regard to petitioner's youth as a mitigating factor. [JA 24] However, even with such a reminder, the trial court's instructions were poor compliance with the ruling of *Eddings* that youth is a relevant mitigating factor of great weight. In an apparent effort to resolve its confusion, the jury returned a question asking the judge to define "mitigating." The judge's response was short and unhelpful: "You have your instructions, please continue deliberation." Supplemental Instruction No. 12. [JA 28]

Having been told by the prosecutor, with the apparent approval of the court, that the boy's youth should not "interfere with [the jurors' deliberations] in this case," [Tr. 63] and having been told incorrectly by the court that the boy had been "certified as an adult," the jury reasonably could have believed under the court's instructions that it was their duty, in "determin[ing] . . . what are mitigating circumstances," to reject youth as a mitigating circumstance. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 518 n. 7 (1979).

3. The Eighth Amendment Requires That A Sentencing Court Give Careful, Particularized Consideration To The Character And Background Of The Defendant In Order To Assess The Fundamental Justice Of The Death Penalty. This Principle Mandates That No Child Be Sentenced To Die Unless The Sentencing Court Finds That The Child Is Morally Culpable To The Same Degree As An Adult And That The Child Is Beyond All Hope Of Rehabilitation.

The unique characteristics of capital punishment demand procedural safeguards in the "particularized consideration of relevant aspects of the character and record of each convicted defendant." *Woodson v. North Carolina*, 428 U.S. at 303 (plu-

prosecutor's directions were those that must be followed. *See Plunkett v. Estelle*, 709 F.2d 1004, 1009-10 (5th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

ality opinion). Ultimately, the infliction of death can only be understood as a community's judgment "that an individual has lost his moral entitlement to live." *Spaziano*, 468 U.S. at 469 (Stevens, J., dissenting). When applied to a child of fifteen years, a death sentence must be understood as a decision that the condemned has lost his moral entitlement to grow. The deliberate killing of a human being by the state "is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice." *Furman v. Georgia*, 408 U.S. at 306 (Stewart, J., concurring).

Even the decisions of state courts that uphold juvenile executions, if due process is strictly observed, discuss the need for great care in reviewing such cases. This judicially-imposed restraint prevails because, in the words of the Mississippi Supreme Court, it is "deeply disturbing that the life of a youth should be taken in punishment for his crime." *Tokman v. State*, 435 So.2d 664, 672 (Miss. 1983), *cert. denied*, 467 U.S. 1256 (1984) (youth's death sentence upheld because of several aggravating circumstances and no mitigating circumstances in addition to age).

The factor of youth must trigger a heightened scrutiny of both the sentencing process and the fundamental justice of the penalty in a particular case. Oklahoma is almost alone in its insistence that there is nothing special about a capital case in which a juvenile is certified to stand trial as though he were an adult.

In *Commonwealth v. Green*, 151 A.2d 241 (Pa. 1959), the Supreme Court of Pennsylvania held that age alone did not justify life imprisonment rather than a death sentence. However, in language that is most instructive in evaluating Oklahoma's treatment of the defendant in this case, the court also stated:

[The defendant's] age [of fifteen] is an important factor in determining the appropriateness of [a death penalty imposed for murder] and should impose upon the sentencing court the duty to be ultra-vigilant in its inquiry into the make-up of the convicted murderer. That youthful age is

an important factor is graphically illustrated by the fact, that so far as our research can ascertain, no person under the age of 16 years and only one person under the age of 19 years has ever suffered the death penalty in this Commonwealth.

* * *

To what extent, if any did the court below measure the understanding and judgment of this 15 year old boy? . . . Beyond his age, the manner of the crime and his I.Q. rating the court below—unless the record contains grave omissions—knew nothing and made no inquiries to determine the background of this boy or what made him “tick.” To the possible argument that [the defendant] could have but did not present such evidence, the answer is clear: when a court sits in judgment to determine whether a 15 year old boy who has committed an atrocious crime shall die in the electric chair it is the duty of the court to inquire and to exhaust every avenue of information that would inform it of the type of individual represented by that boy. Both the criminal act and the criminal himself must be thoroughly, completely and exhaustively examined before a court can exercise a sound discretion in determining the appropriate penalty.

* * *

It is manifest from this record that two factors only led to the imposition of the death penalty—the manner of the murder and the placation of . . . the public plaint. The court below in determining the appropriate penalty considered the criminal act, but not the criminal himself and in so doing committed an abuse of discretion.

151 A.2d at 246-47 (emphasis deleted).

In the case at bar, as in *Green*, and despite *Eddings*, the state seeks to inflict death on a boy for a crime committed at age fifteen, even though: (i) there is utterly nothing in the record to suggest that the death sentence is based on the individual characteristics and background of the defendant; (ii) the sole basis for the death sentence appears to be the jury's horror at the manner of the killing (without regard to extenuating motives); and, most important, (iii) the verdict and judgments of the Oklahoma courts in this case reflect a will to inflict death

just as if the crime had been committed by an adult, without any meaningful assurance that jury, trial court or appellate court looked at this child defendant in a way different than an adult accused of murder. The collective judgment of the Oklahoma courts does not come to grips with two basic principles: First, youth bears directly on the fundamental justice of the death penalty, *Skipper v. South Carolina*, 106 S.Ct. at 1676 (Powell, J., concurring); and second, that the youth of the defendant requires more careful and sensitive consideration of the defendant's prospects for rehabilitation.¹⁰

This Court should insist that no child or adolescent should be sentenced to die unless a jury finds—beyond reasonable doubt—that the child is “both culpable and responsible in the superlative degree,” *Ridge v. State*, 229 P. 649, 650 (Ok. Cr. 1924), “absolutely incorrigible,” *State v. Telsee*, 425 So.2d 1251, 1258 (La. 1983), and a continuing threat to society.¹¹ This test would make it clear that, in such cases as this, the sentence of death cannot rest merely on the nature of the crime—however brutal. It must also fit the character and “moral guilt” of the

¹⁰ Cf. *State v. Valencia*, 132 Ariz. 248, 645 P.2d 239, 242 (1982) (“the age of the defendant, 16 at the time of both crimes, is ‘sufficiently substantial’ to call for life imprisonment instead of death.”); *State v. Maloney*, 105 Ariz. 348, 464 P.2d 793, 803 (1970) (“[W]e feel compelled . . . because defendant was only 15 years of age at the time he killed, to also carefully examine the propriety of the ultimate penalty here. . . .”), cert. denied, 400 U.S. 841 (1970); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977) (sixteen year old's death sentence reduced to life because of his age and background); *People v. Davis*, 29 Cal.3d 814, 633 P.2d 186 (1981) (life imprisonment without parole should not be imposed on offenders below the age of eighteen); *State v. Telsee*, 425 So.2d 1251, 1258 (La. 1983) (forty year imprisonment for rape was unconstitutionally excessive, absent a finding that a seventeen year old was “absolutely incorrigible”).

¹¹ Despite strenuous efforts by the prosecuting attorney in this case, the jury did not find that the defendant would commit more violent acts. [JA 30] Thus, the execution of *this* defendant cannot be justified as necessary for incapacitation or specific deterrence.

defendant as carefully assessed through an indisputably reliable sentencing proceeding. See *Zant v. Stephens*, 462 U.S. 862, 888 (1983); *Woodson v. North Carolina*, *supra*.

This is an offense by a juvenile—acting with three adults, including an older brother—who wrongly believed that he should take the law into his own hands by murdering the man who had been beating his sister.¹²

As the prosecuting attorney argued without irony or appreciation of *Eddings*' nearly identical language, the defendant on trial "was not a normal sixteen year old." *Eddings v. Oklahoma*, 455 U.S. at 116; compare *id.* with the prosecutor's closing argument at Tr. 865. Like *Eddings*, Thompson was a juvenile who experienced serious emotional and behavioral problems. Even Dr. Klein's handwritten psychological report refers to the defendant's history of substance abuse and to past beatings of the defendant perpetrated by the victim-to-be. Dr. Klein's report also provides a good description of the defendant's immaturity as reflected in the fact that "Wayne does not have enough ego to handle or to control his impulses. . . ." [R. 491]

Like *Eddings*, Thompson was abused. Indeed, in this case, the defendant suffered from a habit of paint sniffing induced by the man the defendant later killed, from beatings at the hands of the same man, and from the emotional turmoil of violent family conflict caused in part by the same man. When assessing the fundamental justice of the death sentence, it must not be forgotten that the defendant's crime was against a family mem-

¹² The record reflects the likelihood that the Thompson-Mann family's anger played an important role in the murder. A child or adolescent who kills a family member may be responding, consciously or unconsciously, to perceived family wishes. Sargent, *Children Who Kill: A Family Conspiracy*, 7 Social Work 35 (1962).

ber in a dispute arising from extended, tragic, violent family conflict.¹³

The state of Oklahoma used evidence of defendant's background—and particularly the psychological report—only to conclude that he knew the difference between right and wrong—or that he should have known. On this basis, the state court concluded that the defendant should be tried as if he were an adult. The state then bootstrapped from this decision to waive juvenile jurisdiction to the conclusion that he ought to die for the crime of murder. 724 P.2d at 784. This conclusion denies the relevance of age and the youth's vulnerability to these circumstances, and thus ignores the weight of precedent, tradition, and considerations of justice. It virtually repeats Oklahoma's error in *Eddings*, in which the Oklahoma Court of Criminal Appeals "considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability." 455 U.S. at 113.

The imposition of the death penalty cannot, on the facts of this case, be allowed to stand. Even if the Court does not decide that imposition of the death penalty against a person who was fifteen years old at the time of his offense is unconstitutional per se, this particular death sentence must be struck down as a violation of the Eighth Amendment.

¹³ Thompson was guilty of murder in the first degree, but his crime was not of the type that has prompted recent national concern about juvenile violence. See, e.g., *Eddings v. Oklahoma*, 455 U.S. at 116, citing National Advisory Committee on Criminal Justice Standards and Goals, *Task Force Report on Juvenile Justice and Delinquency Prevention* 3 (1976). The record is clear that Thompson's crime was not of "the most reprehensible classes of homicide known to the law," as defined in *Ridge v. State*, 229 P.2d at 650, when "one takes the life of another against whom he has no grievance, for the purpose of robbery, rape, or personal gain." And yet the jury, influenced by gruesome photographs that a zealous prosecutor used skillfully, condemned Thompson to death on the basis of one finding—that the crime was especially heinous, cruel or atrocious.

II

**THE RELIABILITY OF THE SENTENCING PROCESS IN
THIS CASE WAS UNDERMINED BY THE ADMISSION OF
HIGHLY INFLAMMATORY EVIDENCE THAT PREJUDICED
THE DEFENDANT'S RIGHT TO FAIR, FULL JURY
CONSIDERATION OF ALL MITIGATING CIRCUMSTANCES,
INCLUDING AGE.**

A. The Prosecution Deliberately Used Inflammatory Evidence And Arguments To Convince The Jury Not To Weigh Defendant's Age As A Mitigating Circumstance.

In this case, the trial court admitted evidence described by the Oklahoma Court of Criminal Appeals as "gruesome," "ghastly," and "of little probative value." 724 P.2d at 782-83. The evidence at issue, admitted over the objection of trial counsel, consisted of two color photographs of the victim's body. The photographs were taken after the recovery of the body from the Washita River, where it had been for almost one month. 724 P.2d at 782. The appellate court had particularly harsh words for the prosecutor who offered the evidence: "We do not understand why an experienced prosecutor would risk reversal of the whole case by introducing such ghastly, color photographs with so little probative value." *Id.* Of course, the Court of Criminal Appeals did understand that "[a]dmitting them into evidence served no purpose other than to inflame the jury." *Id.* Nevertheless, the court upheld the judgment and sentence. The admission of the prejudicial evidence was deemed harmless error because evidence of the boy's guilt was strong. *Id.* at 783.

The appellate court did not state specifically that it would have been error to admit the photographs in the penalty phase of the trial, but such a conclusion is clearly warranted. Under Oklahoma law, the same rules apply to the admissibility of evidence in the sentencing phase of a trial as in the guilt phase. 12 Okla. Stat. §2103. "In cases where the photographs in question depict a gruesome scene, the trial court must consider whether the probative value of the particular photograph outweighs the prejudice potentially accompanying its admission

... " *Cooper v. State*, 661 P.2d 905, 907 (Okla. Cr. 1983). The court already made an extremely strong finding as to prejudice and found little probative value with regard to guilt.

This unequivocal finding of prejudice must carry over to the penalty phase. Furthermore, the balance between probativeness and prejudice should remain the same. Admittedly, certain information may be probative for the penalty phase that would not be probative in the guilt phase. In particular, since one of Oklahoma's statutory aggravating circumstances for invoking the death penalty is that "[t]he murder was especially heinous, atrocious, or cruel," evidence speaking to that factor would be probative in the penalty phase. In this case, however, there was already evidence, in the form of defendant's statements to two witnesses and the medical examiner's report, that fully addressed the question of the manner of the killing. See *State v. Poe*, 441 P.2d 512 (Utah 1968) (abuse of discretion to admit color slides of autopsy when all facts already presented by medical and lay testimony). Even if the photographs of the victim's remains were minimally probative, they were merely cumulative. "[W]hen the photos are merely cumulative . . . , that fact must enter into the probative/prejudice balance." *Tobler v. State*, 688 P.2d 350, 356 (Okla. Cr. 1984).

The admission of the photographs, even in the penalty phase, was error. Indeed, these gruesome, inflammatory photographs were even more prejudicial in relation to capital sentencing procedure. These gruesome photographs concentrated the attention of the jury on the effects of post-mortem decomposition rather than the circumstances of the murder. Here, the photographs depicted not only the effect of the killing but also the effect of almost one month's immersion in the Washita River. No juror could help but have his or her attention diverted from the real issue of the defendant's moral guilt.

The error was compounded by the prosecutor's remarks during the penalty phase. His conduct and tactics were not subtle. In closing argument, the prosecutor used the inflammatory evidence to distract the jury from what he described as "the problem": "[W]hat to do with a guilty person who has

killed somebody else that is sixteen years old." [Tr 849] The admission of the prejudicial evidence and the repeated emphasis on that evidence, coupled with the prosecutor's remarks, made it extremely unlikely that the jury treated petitioner's youth as a mitigating factor of great weight. Not only were the gruesome photographs likely to distract the jury's attention from any mitigating circumstances, the prosecutor specifically used the photographs in an attempt to prevent the jury from considering petitioner's youth in mitigation. The prosecutor repeatedly tried to deny the defendant's youth by arguing that he was an adolescent only in years. *Id.* After using the inflammatory photographs, photographs that "served no purpose other than to inflame the jury," 724 P.2d at 782, during a detailed and graphic description of the crime, the prosecutor climaxed his argument: "Its not the sixteen year old, folks, that can do that." [Tr. 865]

The prosecutor's comments were an obvious and successful attempt to subvert this Court's command that the age "of a minor is itself a relevant mitigating factor of great weight." *Eddings*, 455 U.S. at 116. The jury recommended the death sentence on the sole basis of one statutory aggravating factor—that the murder was especially heinous, cruel and atrocious. [Tr. 870] The admission of the photographs "served no purpose other than to inflame the jury." 724 P.2d at 782. Thus, it was far more likely that the jury would decide to inflict death despite defendant's age. Moreover, even with this inflammatory evidence, the jury had great difficulty in reaching its conclusion that the aggravating circumstance was present, as shown by the jury's request for further instruction on mitigation and on the availability of parole if the death penalty were not imposed. See Supplemental Instructions Nos. 12 and 13. [JA at 28-29] In this context, while any error with regard to guilt or innocence may have been harmless, the error in the penalty phase was not harmless.

B. Trial Court Errors Prejudicing Jury Deliberations Over The Death Penalty Are Constitutional Errors. They Cannot Be Disregarded As Merely Harmless.

Imposition of the death penalty is excessive, severe, cruel and unusual if it is not based on a careful moral inquiry into the

culpability of the accused. The punishment must not only fit the crime, it must fit the accused. See *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, *supra*; *Roberts v. Louisiana*, 431 U.S. 633, 637 (1977). The jury's role in assessing the fairness of the most severe of penalties requires full, fair, careful consideration of all mitigating circumstances—without passion or prejudice.

[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence. As this Court observed in *Eddings*, the common law has struggled with the problem of developing a capital punishment system that is "sensible to the uniqueness of the individual." . . . *Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion.

California v. Brown, 107 S.Ct. at 841 (O'Connor, J., concurring) (emphasis added). This Court has stressed that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Zant v. Stephens*, 462 U.S. at 888 (quoting *Lockett v. Ohio*, 438 U.S. at 604 (plurality opinion of Burger, C.J.)).

This Court must not rely on some speculative possibility that the jury might still have decided to sentence a fifteen year old defendant to die without the prejudicial evidence. Such a conclusion would be particularly unwarranted in this case, where the jury had difficulty in imposing the death penalty despite the prejudicial evidence.

If this Court views this case as a whole, the totality of the trial court's constitutional errors in this case—its improper jury instructions, its tolerance of the prosecutor's warning to jurors not to let the boy's youth "interfere" with deliberations,

its admission of inflammatory evidence, and its tolerance for the prosecutor's use of the photographs—undermined the reliability of the sentencing procedure. *Caldwell v. Mississippi*, 472 U.S. ___, 105 S.Ct. 2633 (1985). Though these errors rendered the sentencing phase of the trial fundamentally unfair, contrary to the state's brief in opposition to the writ of certiorari, the proper test is not "fundamental unfairness." *Caldwell* demonstrates the significance—and the constitutional character—of the errors in this case. Indeed, *Caldwell* is applicable here for the same reasons articulated by this Court when it distinguished the case from *Darden v. Wainwright*, ___ U.S. ___, 106 S.Ct. 2464 (1986).

The constitutional errors in this case, like the prosecutor's comments in *Caldwell*, involved evidence, arguments and instructions that created an "intolerable danger" that the jury would misconceive its duty and the law. *Caldwell*, 106 S.Ct. at 2641. Especially in light of the trial court's responsibility for the errors, the prejudicial evidence as used by the prosecutor combined with the erroneous instructions greatly increased the chance that these errors would affect sentencing. Finally, the trial judge's erroneous instruction during the guilt phase of trial that defendant was certified as an adult naturally misled the jury not only as to the facts, but also into believing that its role was far less important than it was. After all, if the defendant was a bona fide, "certified" adult by prior state decision and the jury could decide for itself "what is mitigating," the jury could not help but believe that its responsibility for weighing age in a more careful and sensitive way was reduced—even preempted by a prior certification. Compare *Caldwell*, 105 S.Ct. 2641-42 with *Darden*, 106 S.Ct. at 2473 n. 15.

As this Court stated in *Zant v. Stephens*:

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence man-

dates careful scrutiny in the review of any colorable claim of error.

462 U.S. at 885. In this case, the deliberations of the Court of Criminal Appeals did nothing to ensure the reliability of the sentencing procedure. The appellate court was required to decide "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." 21 Okla. Stat. § 701.13. Though the court did discuss the manner in which the defendant committed this murder, on this critical issue of prejudice and passion, the court did not even consider the effect of the photographs which it had already described as inflammatory and prejudicial.¹⁴

The cry for retribution against Wayne Thompson was the result of inflamed passions, not a careful assessment of moral guilt. However, the proud tradition of this nation and this Court is to resist excessive passion and to pursue a more reasoned justice under law. Moreover, this tradition is deeply rooted in the framers' hopes for the Bill of Rights. In a letter to Jefferson in Paris, Madison expressed doubts whether the "parchment barriers" of declared rights would be effective in a republic. Jefferson replied that Madison overlooked the legal check that a bill of rights would place in an independent judiciary, which, Jefferson continued, would be unaffected by "the 'civium ardor prava jubentium'"—a phrase from Horace, "the frenzy of . . . fellow citizens bidding what is wrong." Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), reprinted in *Thomas Jefferson: Writings* 942, 943 (M. Petersen ed. 1984); Horace, *Odes* III, 3:1 (C. Bennett trans. 1939). No phrase could better illuminate the need for the judiciary to restrain inflamed cries for the execution of children and adolescents.

¹⁴ At a minimum, the Oklahoma Court of Criminal Appeals must be required to rule on the error involved in the admission of the photographs with regard to the penalty phase. While that court held that the error was harmless with regard to the determination of guilt, it made no holding on the harm caused with regard to the imposition of the death penalty.

III.

**TO VINDICATE AMERICAN TRADITIONS OF SPECIAL
TREATMENT OF JUVENILE OFFENDERS, THIS COURT
MUST PREVENT THE EXECUTION OF PERSONS FOR
CRIMES COMMITTED BELOW A SPECIFIED AGE.**

Plainly, the issues respecting the admission of prejudicial evidence, along with the other constitutional errors, such as the jury instructions, provide this Court with narrow grounds for reversing the judgment below. However, these facts also illustrate the inadequacy of current protections for juveniles in capital cases.

The case at bar is an excellent example of how the youth of an offender can be lost in the complex, emotional sentencing stage of a capital case. Despite this Court's requirement that chronological age be given great weight as a mitigating factor, present procedures provide no assurance that the state courts will respect this requirement. To justify a retributive death sentence, the prosecution must provoke rage. Although the Court has insisted that careful considerations must be given to youth as a mitigating factor, *see Eddings*, rage, by its nature, makes rational, sensitive, careful assessment of extenuating and mitigating factors difficult if not impossible. "[W]hen a life is at stake, emotionalism often infects the conduct of the trial itself." *State v. Maloney*, 105 Ariz. 348, 464 P.2d 793, 803 (1970) (reversing death sentence of fifteen year old convicted of murder.).

At a minimum, this Court should reaffirm and clarify *Eddings* to insist that juries be clearly instructed that youth is a mitigating factor of great weight and that an adolescent shall not be condemned to death unless aggravating circumstances plainly outweigh the undeniable, critical mitigating factor of youth. And yet, mere reaffirmation of *Eddings* seems an inadequate response to Oklahoma's continuing disregard for the principles of *Eddings* that the young must be judged more carefully and perhaps punished less harshly than adults. This case illuminates the need for a better standard to protect this

nation's traditions of decent restraint in the punishment of the young.

The only effective means of preventing juvenile executions that are prompted by a prosecutor-induced rage and inadequate state appellate court review—in defiance of this Court's rulings—is an enforceable principle of restraint, such as a minimum age. *See, e.g.,* Greenberg, *Capital Punishment as a System*, 91 Yale L.J. 908 (1982); Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L.J. 757 (1986).

When fundamental values such as those secured by the Bill of Rights are at stake, one of the principal challenges of constitutional interpretation is to develop rules that do not "leave the utmost latitude for evasion." *The Federalist No. 84* at 580 (A. Hamilton) (J. Cooke ed. 1961). Although the judicial role is limited by the principles of federalism and democracy, *Gregg v. Georgia*, 428 U.S. 153, 174-76 (1976) (opinion of Stewart, Powell and Stevens, J.J.) there is special need and justification for judicial intervention in a case such as this.

First, the prohibition against cruel and unusual punishments cannot be interpreted without careful regard for this nation's traditions and sense of decency. A principle restricting the execution of children and adolescents is rooted in this nation's traditions of juvenile justice and its traditions of decent restraint in the assessment of moral guilt of children. Similar humane traditions accounted for the Eighth Amendment in the first place. *See generally* Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 Buff. L.Rev. 783 (1975). The Eighth Amendment is one of a few constitutional provisions that seem explicitly to mandate an ongoing search for evolving principles of humanity and decency. *Weems v. United States*, 217 U.S. 349, 378 (1910); *Gregg v. Georgia*, 428 U.S. at 173 (plurality opinion of Stewart, Powell, and Stevens, J.J.); J. Ely, *Democracy and Distrust* 13-14 (1980). The framers adopted the provision over objections that it was "too indefinite," although even opponents admitted

that "the clause expressed a great deal of humanity." 7 Annals of Cong. 754 (1789) (remarks of Representatives Smith and Livermore), *discussed in Weems v. United States*, 217 U.S. at 368-69 and *Furman v. Georgia*, 408 U.S. at 243-45, 262-63.

Second, the search for principles of humanity and decency to illuminate the meaning of the Eighth Amendment must be, at least in part, a judicial search. When the Eighth Amendment was proposed as part of the Bill of Rights, it was hoped that "independent tribunals of justice [would] consider themselves in a peculiar manner the guardians of those rights." Address of James Madison to the U.S. House of Representatives (June 8, 1789), *reprinted in 5 The Writings of James Madison* 385 (G. Hunt ed. 1904). This nation maintains a distinctive tradition that our courts have special responsibility for reviewing the procedures by which government uses criminal process and legal punishments to enforce the law.

Finally, this special judicial role is designed to protect the role of reason and integrity in government's use of criminal process to enforce law. The courts' "essential quality is detachment, founded on independence." *Gregg v. Georgia*, 428 U.S. at 175 (opinion of Stewart, Powell and Stevens, J.J.) (quoting *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring)). This truth not only restrains the courts; it must guide them.

The ban on cruel and unusual punishments implicates not only legislative policy; it is a rule of procedure limiting the means by which government may enforce the law. If our traditions justify special protections for children, they justify effective special protections. In this context, a principle of decent restraint—a minimum age for the application of the death penalty—is not merely a matter of policy. It is a fundamental matter of justice to the individual as defined by our traditions and our sense of humanity.

It took no violent stretching of democratic theory to suppose an expectation on the part of the people that, in employing the criminal sanction, the political branches would abide the judge's sense of what was mete and decent

in the way of procedure, just as they abided the discretion of the jury. And, if the supposition concerning popular expectations should prove wrong, then the justification of that judicial function was that criminal procedure . . . raised questions of elemental justice to the individual, not of social policy.

A. Bickel, *The Supreme Court and the Idea of Progress* 32 (1970).

Tragically, past efforts of this Court to ensure respect for the nation's traditions in regard to youthful offenders, *Eddings*, have been disregarded by at least one "state[s] courts . . . charged with the front-line responsibility for the enforcement of constitutional rights." *Gideon v. Wainwright*, 372 U.S. 335, 351 (1963) (Harlan, J., concurring). Such disregard "in the long run will do disservice to the federal system." *Id.* Indeed, executions of children and adolescents in the absence of any moral consensus favoring such punishment will erode respect for law and for the retributive goals of capital punishment. "Civilized societies will not tolerate the spectacle of execution of children." American Law Institute, Model Penal Code § 210.6 commentary at 133 (Official Draft and Revised Comments 1980). In this case, a principle of decent restraint will protect our children and adolescents from tragic mistakes caused by the unpredictable effects of rage. It will also protect the nation's traditions of justice for the young.

CONCLUSION

Petitioner respectfully requests that this Court reverse the judgment of the Oklahoma Court of Criminal Appeals insofar as it affirmed the death sentence in this case, vacate the death sentence, and grant such other relief as it deems appropriate.

Respectfully submitted,

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APPENDIX

APPENDIX A

Pertinent Oklahoma Statutes Respecting Definition of "Child" And Trial Of Children As Adults

10 Okla. Stat. § 1101

When used in this title, unless the context otherwise requires:

1. "Child" means any person under eighteen (18) years of age, except for any person sixteen (16) or seventeen (17) years of age who is charged with murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the first degree, use of a firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree, or nonconsensual sodomy.

Amended by Laws 1982, c. 312, § 13, operative Oct. 1, 1982; Laws 1984, c. 120, § 1, emerg. eff. April 10, 1984.

10 Okla. Stat. § 1104.2

A. Any person sixteen (16) or seventeen (17) years of age who is charged with murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the second degree, use of firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree, or nonconsensual sodomy, shall be considered as an adult. Upon the arrest and detention, such sixteen- or seventeen-year-old accused shall have all the statutory and constitutional rights and protections of an adult accused of a crime, but shall be detained in a jail cell or ward entirely separate from prisoners who are eighteen (18) years of age or over.

B. Upon the filing of an information against such accused person, a warrant shall be issued which shall set forth the rights of the accused person, and the rights of the parents,

guardian or next friend of the accused person to be present at the preliminary hearing, to have an attorney present and to make application for certification of such accused person as a child to the juvenile division of the district court. The warrant shall be personally served together with a certified copy of the information on the accused person and on the parents, guardian or next friend of the accused person.

C. The accused person shall file a motion for certification as a child before the start of the criminal preliminary hearing. Upon the filing of such motion, the complete juvenile record of the accused shall be made available to the district attorney and the accused person.

At the conclusion of the state's case at the criminal preliminary hearing, the accused person may offer evidence to support the motion for certification as a child.

The court shall rule on the certification motion of the accused person before ruling on whether to bind the accused over for trial. When ruling on the certification motion of the accused person, the court shall give consideration to the following guidelines, listed in order of importance:

1. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
2. Whether the offense was against persons or property, greater weight being given for retaining the accused person within the adult criminal system for offenses against persons, especially if personal injury resulted;
3. The record and past history of the accused person, including previous contacts with law enforcement agencies and juvenile or criminal courts, prior periods of probation and commitments to juvenile institutions; and
4. The prospects for adequate protection of the public if the accused person is processed through the juvenile system.

The court, in its decision on the certification motion of the accused person, need not detail responses to each of the above

considerations, but shall state that the court has considered each of the guidelines in reaching its decision.

D. Upon completion of the criminal preliminary hearing, if the accused person is certified as a child to the juvenile division of the district court, then all adult court records relative to the accused person and this charge shall be expunged and any mention of the accused person shall be removed from public record.

Laws 1978, c. 231, § 1, eff. Oct. 1, 1978; Laws 1979, c. 257, § 2. [Subsequently Amended by Laws 1985, c. 278, § 1, eff. Nov. 1, 1985; Laws 1986, c. 179, § 2, eff. Nov. 1, 1986]

10 Okla. Stat. § 1112

(a) Except as otherwise provided, a child who is charged with having violated any state statute or municipal ordinance other than those enumerated in Section 1104.2 of this title, shall not be tried in a criminal action but in a juvenile proceeding. If, during the pendency of a criminal or quasi-criminal charge against any person, it shall be ascertained that the person was a child at the time of committing the alleged offense, the district court or municipal court shall transfer the case, together with all the papers, documents and testimony connected therewith, to the juvenile division of the district court. The division making such transfer shall order the child to be taken forthwith to the place of detention designated by the juvenile division, to that division itself, or release such child to the custody of some suitable person to be brought before the juvenile division. However, nothing in this act shall be construed to prevent the exercise of concurrent jurisdiction by another division of the district court or by municipal courts in cases involving children wherein the child is charged with the violation of a state or municipal traffic law or ordinance.

(b) Except as otherwise provided by law, if a child is charged with delinquency as a result of an offense which would be a felony if committed by an adult, the court on its own motion or at the request of the district attorney shall conduct a

preliminary hearing to determine whether or not there is prosecutive merit to the complaint. If the court finds that prosecutive merit exists, it shall continue the hearing for a sufficient period of time to conduct an investigation and further hearing to determine the prospects for reasonable rehabilitation of the child if he should be found to have committed the alleged act or omission.

Consideration shall be given to:

1. The seriousness of the alleged offense to the community, and whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
2. Whether the offense was against persons or property, greater weight being given to offenses against persons especially if personal injury resulted;
3. The sophistication and maturity of the juvenile and his capability of distinguishing right from wrong as determined by consideration of his psychological evaluation, home, environmental situation, emotional attitude and pattern of living;
4. The record and previous history of the juvenile, including previous contacts with community agencies, law enforcement agencies, schools, juvenile courts and other jurisdictions, prior periods of probation or prior commitments to juvenile institutions;
5. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile if he is found to have committed the alleged offense, by the use of procedures and facilities currently available to the juvenile court; and
6. Whether the offense occurred while the juvenile was escaping or in an escape status from an institution for delinquent children.

After such investigation and hearing, the court may in its discretion proceed with the juvenile proceeding, or it shall state its reasons in writing and shall certify that such child shall

be held accountable for its acts as if he were an adult and shall be held for proper criminal proceedings for the specific offense charged, by any other division of the court which would have trial jurisdiction of such offense if committed by an adult. The juvenile proceeding shall not be dismissed until the criminal proceeding has commenced and if no criminal proceeding has commenced within thirty (30) days of the date of such certification, unless stayed pending appeal, the court shall proceed with the juvenile proceeding and the certification shall lapse.

If not included in the original summons, notice of a hearing to consider whether a child should be certified for trial as an adult shall be given to all persons who are required to be served with a summons at the commencement of a juvenile proceeding, but publication in a newspaper when the address of a person is unknown is not required. The purpose of the hearing shall be clearly stated in the notice.

(c) Prior to the entry of any order of adjudication, any child in custody shall have the same right to be released upon bail as would an adult under the same circumstances.

(d) Any child who has been certified to stand trial as an adult pursuant to any certification procedure provided by law and is subsequently convicted of the alleged offense or against whom the imposition of judgment and sentencing has been deferred shall be tried as an adult in all subsequent criminal prosecutions, and shall not be subject to the jurisdiction of the juvenile court in any further proceedings.

(e) An order either certifying a person as a child pursuant to subsection (b) of this section or denying such certification shall be a final order, appealable when entered.

Laws 1968, c. 282, § 112, eff. Jan. 13, 1969; Laws 1973, c. 227, § 1, emerg. eff. May 24, 1973; Laws 1974, c. 35, § 1; Laws 1974, c. 272, § 2, emerg. eff. May 29, 1974; Laws 1977, c. 79, § 2; Laws 1978, c. 231, § 2, eff. Oct. 1, 1978; Laws 1979, c. 257, § 4; Laws 1981, c. 141, § 1.

**PERTINENT OKLAHOMA STATUTES RESPECTING FIRST
DEGREE MURDER AND DEATH PENALTY**

21 Okla. Stat. § 701.7

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

C. A person commits murder in the first degree when the death of a child results from the injuring, torturing, maiming or using of unreasonable force by said person upon the child pursuant to Section 843 of this title.

Amended by Laws 1982, c. 279, § 1, operative Oct. 1, 1982. Approved May 21, 1982. Emergency. Section 2 of Laws 1982, c. 279 provides for an operative date.

21 Okla. Stat. § 701.9

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

Laws 1976, 1st Ex.Sess., c. 1, § 3, eff. July 24, 1976.

21 Okla. Stat. § 701.10

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation.

If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Laws 1976, 1st Ex.Sess., c. 1, § 4, eff. July 24, 1976.

21 Okla. Stat. § 701.11

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding on one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Laws 1976, 1st Ex.Sess., c. 1, § 5, eff. July 24, 1976.

21 Okla. Stat. § 701.12

Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

2. The defendant knowingly created a great risk of death to more than one person;

3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

4. The murder was especially heinous, atrocious, or cruel;

5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;

7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or

8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

Laws 1976, 1st Ex.Sess., c. 1, § 6, eff. July 24, 1976; Laws 1981, c. 147, § 1, emerg. eff. May 8, 1981.

21 Okla. Stat. § 701.13 [as it existed at time of petitioner's crime and trial]

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title

and docket number of the case, the name of the defendant and the name and address of the attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

Laws 1976, 1st Ex.Sess., c. 1, § 7, eff. July 24, 1976.

21 Okla. Stat. § 701.13 [as amended in 1985]

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The court reporter of the trial court shall prepare all transcripts necessary for appeal within six (6) months of the imposition of the sentence.

The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 701.12 of this title.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court. The defendant shall have one hundred twenty (120) days from the date of receipt by the court of the record, transcript notice, and report provided for

in subsection A of this section, in which to submit a brief. The state shall have sixty (60) days from the date of filing of the defendant's brief to file a reply brief. The defendant may file a reply brief within a time period established by the court, however the receipt of the reply brief, the hearing of oral arguments, and the rendering of a decision by the court all shall be concluded within one (1) year after the date of the filing of the reply brief. If the defendant or the state fails to submit their respective briefs within the period prescribed by law, the defendant or the state shall transmit a written statement of explanation to the Presiding Judge of the Court of Criminal Appeals who shall have the authority to grant an extension of the time to submit briefs, based upon a showing of just cause. Failure to submit briefs in the required time may be punishable as indirect contempt of court.

E. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or
2. Set the sentence aside and remand the case for resentencing by the trial court.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

G. If the court reporter of the trial court fails to complete preparation of the transcripts necessary for appeal within the six-month period required by the provisions of subsection A of this section, the court reporter shall transmit a written statement of explanation of such failure to the Chief Justice of the Oklahoma Supreme Court, the Presiding Judge of the Court of Criminal Appeals, and the Administrative Director of the Courts. The Court of Criminal Appeals shall have the authority to grant an extension of the time for filing the transcripts,

based upon a showing of just cause. Failure to complete the transcripts in the required time may be punishable as indirect contempt of court and except for just cause shown may result in revocation of the license of the court reporter.

Amended by Laws 1985, c. 265, § 1, emerg. eff. July 16, 1985.

Section 2 of Laws 1985, c. 265 provides for severability.

**Pertinent Citations To Oklahoma Statutes Establishing
Minimum Ages For Adult Rights And Privileges**

AGE 16:

Work in Hazardous Occupation (40 Okla. Stat. § 72).
Drive without Parental Consent (47 Okla. Stat. § 6-107).
✓ Stop Attending School (70 Okla. Stat. § 10-105).

AGE 18:

Vote in Elections (Constitution of Oklahoma, Art. 3, sec. 1).
Contract (15 Okla. Stat. § 11).
General Age of Majority (15 Okla. Stat. § 13).
Play Bingo (21 Okla. Stat. § 995.13).
Resort to Pool Halls (21 Okla. Stat. § 1103).
Purchase Cigarettes (21 Okla. Stat. § 1241).
Serve on Juries (38 Okla. Stat. § 18 and § 28).
Marry without Parental Consent (43 Okla. Stat. § 3).
Pawn Property (59 Okla. Stat. § 1511).
Consent to Medical Care (63 Okla. Stat. § 2602).

AGE 21:

Purchase or Consume Beer (37 Okla. Stat. § 241).
Purchase or Consume Liquor (37 Okla. Stat. § 537).

APPENDIX B

PERTINENT STATE STATUTES RESPECTING STATUS OF
YOUTH IN DEATH PENALTY STATESMinimum Age Of Offender Required By Thirty-Six Capital
Punishment Jurisdictions

<u>Age at Offense</u>	<u>Total</u>	<u>Jurisdiction</u>
18:	11	<p>California (Cal. Penal Code § 190.5; (Supp. 1985))</p> <p>Colorado (Col. Rev. Stat. § 16.11-103 (1985))</p> <p>Connecticut (Conn. Gen. Stat. Ann. § 53a-46a(h) (1985))</p> <p>Illinois (Ill. Ann. Stat. ch. 38, § 9-1(b) (Supp. 1985))</p> <p>Maryland (Md. Code art. 27, Sec. 412(d) (as amended, April 13, 1987))</p> <p>Nebraska (Nebr. Rev. Stat. § 28-105.01 (Supp. 1984))</p> <p>New Jersey (N.J. Stat. Ann. § 2C: 11-3f (Supp. 1986))</p> <p>New Mexico (N.M. Stat. Ann. § 31-18-14(A) (Repl. 1981))</p> <p>Ohio (Ohio Rev. Code Ann. § 2929.02(E) (Page 1984))</p> <p>Oregon (Ore. Rev. Stat. 161.615 (1985))</p> <p>Tennessee (Tenn. Code Ann. § 37-1-134(1) (1984))</p>

<u>Age at Offense</u>	<u>Total</u>	<u>Jurisdiction</u>
17:	3	Georgia (Ga. Code Ann. § 17-9-3 (1982)) New Hampshire (N.H. Rev. Stat. Ann. § 630.5(ix) (1986)) Texas (Tex. Penal Code Ann. § 8.07(d) (Vernon Supp. 1987))
16:	2	Indiana (Ind. Code Ann. sec. 31-6-2-4 (signed by Governor on Apr. 6, 1987)) Nevada (Nev. Rev. Stat. § 176.025 (1979))
15:	2	Louisiana (La. Rev. Stat. Ann. § 13:1570(A)(5) (1983)) Virginia (Va. Code Ann. § 16.1-269(A) (1982))
14:	7	Alabama (Ala. Code § 12-15-34(a) (1977)) Arkansas (Ark. Stat. Ann. § 41-617(2) (Supp. 1985)) Idaho (Idaho Code § 16-1806A(1) (Supp. 1986)) Kentucky (Ky. Rev. Stat. Ann. § 208E.070(2) (1980)) Missouri (Mo. Ann. Stat. § 211.071 (Vernon Supp. 1985)) North Carolina (N.C. Gen. Stat. § 7A-608 (1981)) Utah (Utah Code Ann. § 78-3a-25(1) (Supp. 1983))
13:	1	Mississippi (Miss. Code Ann. § 43-21-151 (1985))
12:	1	Montana (Mont. Code Ann. § 41-5-206(1) (a) (1985))

<u>Age at Offense</u>	<u>Total</u>	<u>Jurisdiction</u>
No Minimum: 9	9	Arizona (Ariz. Rev. Stat. Ann. § 13-703(G)(5) (Supp. 1985)) Delaware (11 Del. Code Ann. § 4209(c) (Repl. 1979)) Florida (Fla. Stat. Ann. § 921.141(6)(g) (West Supp. 1984)) Oklahoma (21 Okla. Stat. § 701.01 (West 1983)) Pennsylvania (Pa. Code Ann. § 6355(e) (1985)) South Carolina (S.C. Code Ann. § 16-3-20(c)(b)(7) (1985)) South Dakota (S.D. Codified Laws Ann. 23A-27A-1 (Supp. 1984)). Washington (Wash. Rev. Code § 10.95.070(7) (Supp. 1986)) Wyoming (Wyo. Stat. § 6.2-102(j)(vii) (Repl. 1983))

**Minimum Statutory Age For Any Criminal Court Jurisdiction
(12 states)**

AGE SIXTEEN:

INDIANA: Ind. Code Ann. § 31-6-2-4 (H.B. 1022, 1987).

AGE FIFTEEN:

LOUISIANA: La. Rev. Stat. Ann. § 13:1570(a)(5) (1983).

VIRGINIA: Va. Code Ann. § 16.1-269(A) (1982).

AGE FOURTEEN:

ALABAMA: Ala. Code § 12-15-34(A) (1977).

ARKANSAS: Ark. Stat. Ann. § 41-617(2) (Supp. 1985).

IDAHO: Idaho Code § 16-1806A(1) (Supp. 1986).

KENTUCKY: Ky. Rev. Stat. Ann. § 208E.070(2) (1980).

MISSOURI: Mo. Ann. Stat. § 211.071 (Supp. 1985).

NORTH CAROLINA: N.C. Gen. Stat. § 7A-608 (1986).

UTAH: Utah Code Ann. § 78-3a-25(1) (Supp. 1985).

AGE THIRTEEN:

MISSISSIPPI: Miss. Code Ann. § 43-21-151 (1985).

AGE TWELVE:

MONTANA: Mont. Code Ann. § 41-5-206(1)(a) (1985).

**Statutes Specifically Listing Age Of Offender As Mitigating
Factor**

(27 states)

ALABAMA: Ala. Code § 13A-5-51(7) (1982).

ARIZONA: Ariz. Rev. Stat. Ann. § 13-703G.5 (Supp. 1986).

ARKANSAS: Ark. Stat. Ann. § 41-1304(4) (Repl. 1977).

CALIFORNIA: Cal. Penal Code § 190.05(h)(9) (Supp. 1987).

COLORADO: Colo. Rev. Stat. § 16-11-103(5)(a) (Supp. 1985).

FLORIDA: Fla. Stat. Ann. § 921.141(6)(g) (Supp. 1985).

INDIANA: Ind. Code Ann. § 35-50-2-9(c)(7) (H.B. 1022, 1987).

KENTUCKY: Ky. Rev. Stat. § 532.025(2)(b)(8) (1984).

LOUISIANA: La. Code Crim. Proc. Ann. art. 905.5(f) (1984).

MARYLAND: Md. Code art. 27, § 413(g)(5) (Supp. 1986).

MISSISSIPPI: Miss. Code Ann. § 99-19-101(6)(g) (Supp. 1986).

MISSOURI: Mo. Rev. Stat. § 565.032(3)(7) (Supp. 1987).

MONTANA: Mont. Code Ann. § 46-18-304(7) (1984).

NEBRASKA: Nebr. Rev. Stat. § 29-2523(2)(d) (1985).

NEVADA: Nev. Rev. Stat. § 200.035(6) (1985).

NEW HAMPSHIRE: N.H. Rev. Stat. Ann. § 630.5(II)(b)(5) (1986).

NEW JERSEY: N.J. Stat. Ann. § 2C:11-3(c)(5)(c) (Supp. 1986).

NEW MEXICO: N.M. Stat. Ann. § 31-20A-6(I) (Supp. 1986).

NORTH CAROLINA: N.C. Gen. Stat. § 15A-2000(f)(7) (1983).

OHIO: Ohio Rev. Code Ann. § 2929.04(B)(4) (1982).

PENNSYLVANIA: Pa. Cons. Stat. Ann. art. 42, § 9711(e)(4) (1982).

SOUTH CAROLINA: S.C. Code Ann. § 16-3-20(c)(b)(7 & 9) (1985).

TENNESSEE: Tenn. Code Ann. § 39-2-203(j)(7) (Repl. 1982).

UTAH: Utah Code Ann. § 76-3-207(2)(e) (Supp. 1983).

VIRGINIA: Va. Code § 19.2-264.4(B)(v) (Repl. 1983).

WASHINGTON: Wash. Rev. Code § 10.95.070(7) (Supp. 1987).

WYOMING: Wyo. Stat. § 6-2-102(j)(vii) (Repl. 1983).

APPENDIX C

JUVENILE AND TOTAL EXECUTIONS IN THE UNITED STATES, BY DECADE, 1900 TO PRESENT

Current as of March 31, 1987

<u>Decade</u>	<u>Total Executions</u>	<u>Juvenile Executions</u>	<u>Percentage</u>
1900-09	1,192	23	1.9%
1910-19	1,039	24	2.3%
1920-29	1,169	27	2.3%
1930-39	1,670	41	2.5%
1940-49	1,288	53	4.1%
1950-59	716	16	2.2%
1960-69	191	3	1.6%
1970-79	3	0	0%
1980-87	67	3	4.5%
Totals:	7,355	190	2.6%

Sources of data: W. Bowers, Legal Homicide 54 (1984); NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. 1 (Mar. 1, 1987); Streib, "The Eighth Amendment and Capital Punishment of Juveniles," 34 Cleve. St. L. Rev. 363, 380 (1986).

APPENDIX D

DEATH SENTENCES FOR JUVENILE OFFENDERS,
JANUARY 1, 1982, THROUGH MARCH 31, 1987

Year	Offender's Name	Age at Crime	Race	State	Current Status
1982	Barrow, Lee Roy	17	W	TX	reversed in 1985
	Cannon, Joseph J.	17	W	TX	now on death row
	Carter, Robert A.	17	B	TX	now on death row
	Garrett, Johnny F.	17	W	TX	now on death row
	Johnson, Lawrence	17	B	MD	reversed twice but resentenced to death in 1983 and 1984.
	Lashley, Frederick	17	B	MO	now on death row
	Legare, Andrew	17	W	GA	reversed in 1983; resentenced to death in 1984; reversed in 1986.
	Stanford, Kevin	17	B	KY	now on death row
	Stokes, Freddie	17	B	NC	reversed in 1982; resentenced to death in 1983; reversed in 1987.
	Thompson, Jay	17	W	IN	reversed in 1986
1983	Trimble, James	17	W	MD	now on death row
	Bey, Marko	17	B	NJ	now on death row
	Cannaday, Attina	16	W	MS	reversed in 1984
	Harris, Curtis P.	17	B	TX	reversed in 1986
	Harvey, Frederick	16	B	NV	reversed in 1984
	Hughes, Kevin	16	B	PA	now on death row
	Johnson, Lawrence	17	B	MD	reversed in 1983 but resentenced to death in 1984
	Lynn, Frederick	16	B	AL	reversed in 1985 but resentenced to death in 1986
	Mhoon, James	16	B	MS	reversed in 1985
	Stokes, Freddie	17	B	NC	reversed in 1987

Year	Offender's Name	Age at Crime	Race	State	Current Status
1984	Aulisio, Joseph	15	W	PA	now on death row
	Brown, Leon	15	B	NC	now on death row
	Johnson, Lawrence	17	B	MD	now on death row
	Legare, Andrew	17	W	GA	reversed in 1986
	Patton, Keith	17	B	IN	now on death row
1985	Thompson, W. W.	15	W	OK	now on death row
	Livingston, Jesse	17	B	FL	now on death row
	Morgan, James	16	W	FL	now on death row
	Ward, Ronald	15	B	AR	now on death row
	Comeaux, Adam	17	B	LA	now on death row
1986	Cooper, Paula P.	15	B	IN	now on death row
	LeCroy, Cleo	17	W	FL	now on death row
	Lynn, Frederick	16	B	AL	now on death row
	Sellers, Sean	16	W	OK	now on death row
	Wilkins, Heath	16	W	MO	now on death row
1987	Williams, Alexander	17	B	BA	now on death row
	[none reported]				

APPENDIX E

THIRTY-EIGHT PERSONS ON DEATH ROW AS OF
DECEMBER 31, 1983, FOR CRIMES COMMITTED WHILE
UNDER AGE EIGHTEEN

State	Prisoner	Age at Time of Offense	Sex	Race
Alabama	Davis, Timothy	17	male	white
	Jackson, Cernel	16	male	black
	Lynn, Frederick	17	male	black
Florida	Magill, Paul	17	male	white
	Morgan, James	16	male	white
	Peavy, Robert	17	male	black
Georgia	Bruger, Christopher	17	male	white
	Buttrum, Janice	17	female	white
	High, Jose	16	male	black
Indiana	Legare, Andrew	17	male	white
	Thompson, Jay	17	male	white
	Ice, Todd	15	male	white
Kentucky	Stanford, Kevin	17	male	black
	Prejean, Dalton	17	male	black
	Johnson, Lawrence	17	male	black
Louisiana	Trimble, James	17	male	white
	Cannady, Attina	16	female	white
	Jones, Larry	17	male	black
Maryland	Mhoon, James	16	male	black
	Tokman, George	17	male	white
	Lashley, Frederick	17	male	black
Mississippi	Harvey, Frederick	16	male	unkwn.
	Bey, Marko	17	male	black
	Oliver, John	14	male	black
Missouri	Stokes, Freddie Lee	17	male	black
	Eddings, Monty	16	male	white
Nevada				
New Jersey				
N. Carolina				
Oklahoma				

<u>State</u>	<u>Prisoner</u>	<u>Age at Time of Offense</u>	<u>Sex</u>	<u>Race</u>
Pennsylvania	Hughes, Kevin	16	male	black
S. Carolina	Roach, James Terry	17	male	white
Texas	Barrow, Lee Roy	17	male	white
	Battie, Billy	17	male	unkwn.
	Burns, Victor Renay	17	male	black
	Cannon, Joseph John	17	male	white
	Carter, Robert A.	17	male	black
	Garrett, Johnny F.	17	male	white
	Graham, Gary L.	17	male	black
	Harris, Curtis Paul	17	male	black
	Pinkerton, Jay K.	17	male	white
	Rumbaugh, Charles	17	male	white

*Sources of data: NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. (Dec. 20, 1983); Brief for Petitioner at 19a app. E, Eddings v. Oklahoma, 455 U.S. 104 (1982); Streib, "The Eighth Amendment and Capital Punishment of Juveniles," 34 Cleve. St. L. Rev. 363, 385 (1986).

APPENDIX F

THIRTY-TWO PERSONS ON DEATH ROW AS OF MARCH 31, 1987, FOR CRIMES COMMITTED WHILE UNDER AGE EIGHTEEN

<u>State</u>	<u>Prisoner</u>	<u>Age at Time of Offense</u>	<u>Sex</u>	<u>Race</u>
Alabama	Davis, Timothy	17	male	white
	Jackson, Carnel	16	male	black
	Lynn, Frederick	17	male	black
Arkansas	Ward, Donald	15	male	black
Florida	LeCroy, Cleo	17	male	white
	Livingston, Jesse	17	male	black
	Magill, Paul	17	male	white
	Morgan, James A.	16	male	white
Georgia	Burger, Christopher	17	male	white
	Buttrum, Janice	17	female	white
	Williams, Alexander	17	male	black
Indiana	Cooper, Paula R.	15	female	black
	Patton, Keith	17	male	black
Kentucky	Stanford, Kevin	17	male	black
Louisiana	Comeaux, Adam	17	male	black
	Prejean, Dalton	17	male	black
Maryland	Johnson, Lawrence	17	male	black
	Trimble, James	17	male	white
Mississippi	Jones, Larry	17	male	black
	Tokman, George	17	male	white
Missouri	Lashley, Frederick	16	male	black
	Wilkins, Heath	16	male	white
New Jersey	Bey, Marko	17	male	black
N. Carolina	Brown, Leon	15	male	black
Oklahoma	Sellers, Sean	16	male	white
	Thompson, W. Wayne	15	male	white
Pennsylvania	Aulisio, Joseph	15	male	white
	Hughes, Kevin	16	male	black
Texas	Cannon, Joseph John	17	male	white
	Carter, Robert A.	17	male	black
	Garrett, Johnny F.	17	male	white
	Graham, Gary L.	17	male	black

*Sources of data: NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. (Dec. 20, 1983); Brief for Petitioner at 19a app. E, Eddings v. Oklahoma, 455 U.S. 104 (1982); Streib, "The Eighth Amendment and Capital Punishment of Juveniles," 34 Cleve. St. L. Rev. 363 (1986).

APPENDIX G
ARRESTS AND DEATH SENTENCES FOR WILLFUL
CRIMINAL HOMICIDE, BY AGE GROUPS, 1982-1985

All Ages

Year	Total Arrests	Total Death Sentences
1982	18,511	284
1983	18,064	259
1984	13,676	280
1985	15,777	(280 est.)*
TOTAL	66,028	1,103

Under Age 16

Year	Total Arrests	% of Arrests For All Ages	Total Death Sentences	% of Sentences For All Ages
1982	417	2.2%	0	0.0%
1983	368	2.0%	0	0.0%
1984	294	2.1%	3	1.1%
1985	381	2.4%	1	0.4%
TOTAL	1,460	2.2%	4	0.4%

Under Age 18

Year	Total Arrests	% of Arrests For All Ages	Total Death Sentences	% of Sentences For All Ages
1982	1,579	8.5%	11	3.9%
1983	1,345	7.4%	9	3.5%
1984	1,004	7.3%	6	2.1%
1985	1,311	8.3%	3	1.1%
TOTAL	5,239	7.9%	29	2.6%

*estimated (exact data unavailable)

Sources of data: UNITED STATES DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT 1984 6 (1986); UNITED STATES DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 174 (1985); *id.* at 172 (1984); *id.* at 179 (1983); *id.* at 176 (1982); and Appendix D.

AUG 12 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

WILLIAM WAYNE THOMPSON, Petitioner

v.

STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE*
CHIEF, CRIMINAL & FEDERAL DIVISIONS

WILLIAM H. LUKER
SUSAN STEWART DICKERSON
SANDRA D. HOWARD
M. CAROLINE EMERSON
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112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

Counsel for Respondent

* Counsel of Record

BEST AVAILABLE COPY

IN THE
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BRIEF OF PETITIONER

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

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WILLIAM H. LUKER
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Counsel for Respondent

* Counsel of Record

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PROPOSITION I

THIS COURT SHOULD NOT SET A MINIMUM
CHRONOLOGICAL AGE BELOW WHICH A
STATE COULD NEVER GO IN IMPOSING
THE DEATH PENALTY; SUCH AN INFLEXIBLE
STANDARD WOULD BE AN INAPPROPRIATE USE
OF THE COURT'S POWER UNDER THE CONSTI-
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No. 86-6169

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

WILLIAM WAYNE THOMPSON,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BRIEF OF THE RESPONDENT
STATE OF OKLAHOMA

STATEMENT OF THE CASE

William Wayne Thompson,¹ herein-
after referred to as the petitioner, was
convicted by a jury for the crime of
murder in the first degree in violation
of Okla. Stat. Ann. tit. 21, § 701.7
(West 1983) in the District Court of

¹ Thompson was born on March 4, 1967.
The murder for which he was convicted
occurred on January 23, 1983. There-
fore, Thompson was approximately fifteen
years, ten and one-half months old at
the time of the crime (R.479).

Grady County, State of Oklahoma.

The original information was filed against Bobby Joe Glass, Anthony James Mann, Richard Jones, and the petitioner, who was initially listed in the information as an unnamed juvenile under the age of eighteen (R. 1).

After a certification hearing, the court made findings, and ordered the petitioner to stand trial as an adult on April 21, 1983. That order was affirmed by the Court of Criminal Appeals on January 11, 1984, in an unpublished opinion (R. 634-35). After his certification, the petitioner was prosecuted as an adult defendant (R. 31). The State filed bills of particulars asking for the death penalty against each of the defendants (R. 10, Tr. 86-89). The case of the four defendants was severed for trial, and the petitioner was tried by himself.

At the conclusion of the first stage of the trial, the jury found the petitioner guilty of murder in the first degree and at the conclusion of the second stage of the trial, the jury imposed the death sentence upon the petitioner. The jury found the existence of one aggravating circumstance, that the murder was "especially, heinous, atrocious, or cruel," and rejected a second one, that there existed a probability that the petitioner would commit criminal acts of violence that would constitute a continuing threat to society (J.A. 20; Tr. 870). The trial court sentenced the defendant in accordance with the jury's verdict. The petitioner's conviction was affirmed in Thompson v. State, 724 P.2d 780 (Okla. Crim. App. 1986).

I. The Facts Presented at the Certification Hearings.

The certification hearing was divided into two parts. The prosecutive merit hearing was held on March 29, 1983 and the hearing on amenability to the juvenile system was held on April 21, 1983.

At the prosecutive merit hearing, the State called five witnesses: a pathologist who testified concerning the cause of death (P.M.Tr. 11), two witnesses who testified concerning the recovery of the body (P.M.Tr. 40-48, 60-67), and two witnesses who heard the petitioner say that he murdered the victim, Charles Keene (P.M.Tr. 16-19, 48-50).

At the conclusion of the hearing, the court found that there was prosecutive merit to the charge of murder in the first degree (P.M.Tr. 67). The court also ordered that another hearing be conducted to determine whether the

petitioner was amenable to the juvenile system, or whether he should be certified to stand trial as an adult (P.M. Tr. 67).

At the certification hearing on April 21, 1983, Dr. Helen Kline, a clinical psychologist at Central State Hospital in Norman, who also maintained a private practice, testified that she examined the petitioner in the Grady County jail on two occasions. (C.Tr. 7-8). She gave him the Minnesota Multiphasic Personality Inventory test, the Rorschach test, the Bender-Gestalt test (to determine whether the petitioner had organic impairment), and the Wide-Range Achievement test (which measures level of education, reading, spelling, and arithmetic). (C.Tr. 9).

Dr. Kline testified that in her opinion the petitioner understood the difference between right and wrong, and that he had an antisocial personality.

(C.Tr. 9). She stated that she did not believe his personality could be modified, that his contact with law enforcement became progressively more severe, and that his behavior had become more anti-social. (C.Tr. 10-11). Dr. Kline testified he would become more of a threat to the community and more violent. (C.Tr. 11). She testified that the petitioner was street-wise, and that he assumed that because he was sixteen years old he was outside any severe penalties of the law, and he did not believe that there would be severe repercussions resulting from his behavior. (C.Tr. 11).

A copy of a psychological report she prepared was admitted as Exhibit 11. (C.Tr. 12-14). The report noted the types of tests given to the petitioner and that there was no evidence of organic impairment or psychotic process in the test data.

On cross-examination Dr. Kline stated that the petitioner had no evidence of organic impairment or schizophrenia and that the MMPI and the Rorschach tests would have been sensitive to any thought disorders. (C.Tr. 25).

The second witness was Detective Kenneth Reed of the Chickasha, Oklahoma Police Department. Detective Reed testified that he had come in contact with the petitioner during a burglary interview, and that the petitioner did not seem to fear any consequences of the crime (C.Tr. 28).

A woman named Margaret Lee Kirk testified that she and her husband operated the Stork Club. On February 2nd or 3rd of 1983 (approximately one week after the murder of Charles Keene), the petitioner came into that establishment (C.Tr. 40-41). When Ms. Kirk told him to leave, he stated "If I'm big enough to kill, I'm big enough to drink beer." (C.Tr. 41).

The next witness was Ronald Esmond, a captain with the Chickasha Police Department, who testified about responding to a call at the petitioner's residence on October 7, 1981 (C.Tr. 43). He testified concerning the petitioner's loud, combative and abusive behavior. The petitioner's mother advised Esmond that the petitioner was a run-away, and that she wanted him taken out of the house. Captain Esmond also testified that at the time the petitioner appeared to be intoxicated. (C.Tr. 43).

The next witness was John Ladado, a police officer with the Chickasha Police Department who testified that on February 7, 1983, he saw the petitioner staggering across the street. (C.Tr. 45-46). When Ladado approached him, the petitioner stated that his name was William Wayne Thompson and that he was a juvenile. Ladado arrested the petitioner for public intoxication. He said that

the petitioner was cocky, and did not want to answer any questions at the booking. (C.Tr. 46).

Ladado also testified that when he transferred the petitioner to the county jail, the petitioner told Ladado to shoot him, because "you'll have to some day, fucker." (C.Tr. 47). The petitioner also advised Ladado and a Sergeant Quinton that they would be dead. (C.Tr. 47).

Michael Bradley, an assistant district supervisor for Court Related Community Services for the Department of Human Services, testified concerning placement options in the juvenile system for the petitioner.

Mary Robinson, who was also employed by the Department of Human Services Court Related and Community Services, testified that she came in contact with the petitioner on the following occasions: (1) August of 1980 for assault and battery; (2) October of 1981 for assault and bat-

tery; (3) May of 1982 for vandalism; (4) May of 1982 for attempted burglary; (5) July of 1982 for assault and battery with a knife; (6) December of 1982 for inhalation of toxic vapors; (7) February of 1983 for public intoxication; and (8) February of 1983 for assault with a deadly weapon. (C.Tr. 51-54).

Ms. Robinson testified that the petitioner had been provided counseling sessions with professionals, and with Youth Services. She stated that he had been placed in the Boy's Ranch Town, a church home in Oklahoma City, but refused to return after he was home on leave. (C.Tr. 54).

She testified none of the counseling or placements with the Department of Human Services seemed to improve the petitioner's behavior, and that she did not think the Department of Human Services had any services from which the petitioner could benefit. The petitioner in her

opinion, was not amenable for rehabilitation within the juvenile system. (C.Tr. 54-55). Ms. Robinson stated that the petitioner should stand trial as an adult. (C.Tr. 55).

Ms. Robinson also testified that she had monitored the petitioner's attitude in jail after he was arrested for murder in the present case. The petitioner seemed unconcerned about what had happened, and did not show any remorse. (C.Tr. 55). A certification study she had prepared was introduced into evidence as Exhibit 12 (C.Tr. 55-56).

The certification study listed the petitioner's contacts with the juvenile system as set forth above. The report noted that the act that the petitioner committed in the present case showed sophistication and maturity beyond the age of 15.9. The report stated that because of the act and the petitioner's prior delinquent history, it was unreal-

istic to believe that he would benefit from the services offered by the Department of Human Services, and it recommended that he be certified to stand trial as an adult.

The petitioner produced two witnesses. His half-sister described his family life, testified that the petitioner had minded her, and stated that he was not violent until he started sniffing paint. (C.Tr. 62-70). The petitioner's former attorney testified concerning the positive relationship he had had with the petitioner. (C.Tr. 76-87).

At the conclusion of the hearing, the court made findings with regard to the six statutory guidelines set forth in Okla. Stat. Ann. tit. 10, § 1112(b), (West Supp. 1987) and ruled that he should be certified to stand trial as an adult and be held accountable for his actions as if he were an adult. (C.Tr. 107-09). A written order to that effect was also filed (J.A. 5-8).

II. The Facts Presented at Trial.

This case concerned the abduction and murder of one Charles Keene during the early morning hours of Sunday, January 23, 1983. The evidence revealed that Anthony James Mann, Bobby Joe Glass, Richard Jones, and the petitioner took Keene from a trailer in Amber, Oklahoma, and eventually transported him to a location on the banks of the Washita River. They murdered him there, and then deposited his body in the river after wrapping a chain and a concrete block

The petitioner was the younger brother of co-defendant Anthony Mann. He was living with his mother, Dorothy Thompson, his father, and his brother and sisters in Chickasha, Oklahoma. Bobby Joe Glass, and Glass's girlfriend, Charlesetta Garcia, and her two children, also resided at the Thompson residence (Tr. 509, 594, 631, 702-03).

The petitioner had another half-brother, Danny Mann, and a half-sister, Vicky Mann, the ex-wife of the victim, Charles Keene (Tr. 588, 714). Vicky shared the trailer house at Amber, Oklahoma, with the victim (Tr. 587, 591), and it was the conflict between her and Keene that led to his murder.

Vicky married Charles Keene in 1974, and divorced him three years later (Tr. 588). While they were married they had one child. After they were divorced they continued to cohabit and had another child (Tr. 588, 591).

Vicky's relationship with Charles Keene was bitter and violent, and she testified that he was a paint sniffer (Tr. 611-12). Vickie lived with Charles after the divorce only because he threatened to disfigure her if she saw another man (Tr. 591). On occasion, she would make him leave, but he would return (Tr. 604). Charles occasionally beat up

the petitioner and Vicky's younger sister (Tr. 614).

Vicky testified that on the Friday preceding the murder, Charles beat her up at Dorothy Thompson's house (Tr. 612). The turmoil spilled over into the next day when Vicky, Danny Mann, and Anthony Mann went to Amber to get Vicky's car, which Charles had taken back to the trailer house (Tr. 588-89, 614). They found Charles sniffing paint in the trailer.

An altercation ensued, during which Danny and Anthony eventually got the keys out of Charles's pocket. Charles then grabbed a kitchen knife and chased them out of the house (Tr. 589, 717).

Vicky Keene spent the night at the Thompson home, and went to bed at some time between nine or ten that evening (Tr. 594).

The petitioner's girlfriend, Donetta Bradford also spent the night at the

Thompson residence as a guest of the petitioner's younger sister, Cindy (Tr. 683-84). That evening, when the petitioner, Donetta, Cindy, and another person named Stacy Knight were congregated in a bedroom in the Thompson house, the petitioner stated, "we're going to kill Charles." (Tr. 685). He then took a coat from the closet and left (Tr. 685-86).

Charlesetta Garcia, Glass's girlfriend, was also spending the night at the Thompson residence on January 22, 1983. She testified that Anthony Mann, Richard Jones, Bobby Glass and the petitioner were all present that evening, and left together, taking Stacy Knight with them (Tr. 631-32).

During that same night at approximately 2:25 a.m. Malcolm ("Possum") Brown was awakened by the sound of a gunshot that came from his front porch. Mr. Brown lived two miles north of Chickasha,

Oklahoma (Tr. 468). Brown knew Bobby Glass and Charles Keene (Tr. 479, 490). Brown and his wife, Lucille, had returned earlier that evening from a trip to Florida.

Shortly after he heard the shot, Brown heard someone frantically knocking on his front door and shouting, "Possum, open the door. Let me in. They're going to kill me." (Tr. 469-70). Brown immediately called the police (Tr. 494-95). He then opened the front door, and saw a man on his knees on his front porch attempting to repel blows with his arms and hands (Tr. 471). There were four other men on the porch. One man, standing apart from the others, was holding a gun. The other three were huddled around the man who was down, hitting and kicking him. One of these men was beating the victim with an object that was approximately twelve to eighteen inches in length. The man who was down never attempted to hit back (Tr. 474-75).

While the fight was going on, one man said, "Give me that gun." Then another one answered, "No, you almost shot me once and I'm going to keep it this time." (Tr. 473). Then one of the men said, "this is for the way you treated our sister." (Tr. 476). Someone else asked Brown if he had called the Sheriff and Brown replied that he had (Tr. 496). Brown told them that four against one in a fight was not fair, and was advised that he had better get back into the house or they would "give [him] a little of it." (Tr. 476).

The phone rang and Brown went back into the house and answered it. The Sheriff's office had called back to see if the disturbance was still in progress, and Brown assured them that it was (Tr. 477). While he was on the phone his wife went to the bedroom, and through the bedroom window was able to observe the men leaving. Someone said, "put him in the

truck," and another man replied, "no." Then another voice said, "yeah, put him in there." She heard the truck lid slam down and the car left proceeding south toward town (Tr. 498). Neither Brown nor his wife was able to identify any of the men. (Tr. 472, 478, 500).

When the Oklahoma State Bureau of Investigation examined the yard later, Agent Robert Lee found an expended .45 caliber shell in the front yard, and three white buttons near the front porch (Tr. 387). He also took samples of an area on the porch carpet that appeared to be a blood stain (Tr. 386). Subsequent analysis of this carpet sample revealed that the blood stain was caused by a Type A blood, the blood type of Charles Keene (Tr. 438, 450-51, 666).

About two to three hours after the petitioner had left the Thompson house, he returned to that residence and walked into the bedroom where Donetta Bradford

was staying. His nose was bleeding and he was wet from the chest down. (Tr. 686-87). He was not wearing the green toboggan that he had been wearing when he left (Tr. 686, 691).

Donetta Bradford helped the petitioner take off his boots, and the petitioner said, "we killed him. I shot him in the head and cut his throat and threw him in the river" (Tr. 687-88).

Later the petitioner told her that the persons that he had been referring to were Richard Jones, Bobby Glass, Anthony Mann, and himself. He also said that they had taken Stacy Knight home on the way because they were afraid that he might tell on them (Tr. 688).

Early that same morning, Benny McCarthy came to the Thompson house. McCarthy is Charlesetta Garcia's younger brother (Tr. 637). He saw the petitioner crying in his bedroom. When McCarthy asked him what was wrong, the petitioner

would say nothing (Tr. 510-11). McCarthy then went into the kitchen where he heard Anthony Mann and Bobby Glass discuss going back to the river to make sure that the body was not floating, and getting rid of the gun (Tr. 514).

Charlotte Mann, Anthony Mann's former wife, drove to the Thompson residence early that same morning (Tr. 567). She parked her car and walked past the petitioner and his mother on the front porch. The petitioner's mother was trying to calm him down. The petitioner was wet and nervous, and Charlotte Mann heard him say that he had killed him, that Charles Keene was dead, and that Vicky did not have to worry about him anymore (Tr. 568).

The murder weapon, a .45 caliber pistol, was disposed of by Bobby Glass. A comparison of the bullet and bullet fragments taken from the body and the gun revealed that these bullets were

fired from that pistol (Tr. 66, 678; State's Exhibit Nos. 3, 22 and 23). A ballistic examination showed that the .45 caliber cartridge casing found in Malcolm Brown's front yard had been fired from that pistol (Tr. 387-88, 677-78).

During the days following the murder the petitioner made other admissions. A few days afterwards, Charlesetta Garcia saw the petitioner carrying a pair of boots. She noticed hair on the boots, and asked him where the hair came from. He said that that was where he had kicked Charles Keene in the head. He also told her that he had cut Charles's throat and chest, and had shot him in the head (Tr. 634-35).

At some point in time after the murder, but before Charles's body was found, the petitioner and a friend named Gordon had a conversation with Charlotte Mann. Charlotte told the petitioner

that a friend had told her that he had seen Charles dancing at a local bar. The petitioner remarked that that would be hard for Charles to do with a bullet in his head (Tr. 575).

In a separate conversation with Anthony Mann and the petitioner, Charlotte remarked that the body would be found, and that they would be in trouble. They answered by telling her that the body would not be found because a chain and blocks were attached to the body (Tr. 575-76).

On February 18, 1983, Charles Keene's body was recovered from the Washita River (Tr. 649). A concrete block was attached to the body by a log chain, which was wrapped around the victim's legs (Tr. 654; State's Exhibit No. 14). An autopsy of the body revealed that death was caused by gunshot wounds to the head and the chest (Tr. 667). Other injuries to the body included cuts on the

left side of the chest, a seventeen centimeter cut on the neck and throat which was about one-half inch in depth, a broken shin bone in the lower left leg, and multiple abrasions and wounds on the body, particularly on the victim's face and arms (Tr. 661). Keene was alive when all of the wounds were inflicted (Tr. 661-62, 669).

On February 20, 1983, the petitioner and Anthony Mann were arrested in Eufaula, Oklahoma. Officer Bill Day of the Eufaula City Marshall's Office found a knife on the petitioner at the time of his arrest (Tr. 373, 374, 377; State's Exhibit No. 32). Criminalologist Ann Reed was able to determine that blood was on the knife, but she was unable to determine the blood type, or if it was human blood (Tr. 453-54, 460).

At the close of the evidence in the first stage, the jury returned a verdict of guilty for the crime of Murder in the First Degree (Tr. 771-73).

During the second stage of the trial the State called three additional witnesses, Dr. Helen Kline, Oklahoma State Bureau of Investigation Agent Robert Lee, and Lieutenant Ken Reed of the Chickasha Police Department.

Dr. Kline is the clinical psychologist who testified in the petitioner's certification proceeding (Tr. 777). She testified that in her professional opinion the petitioner would, in all probability, commit acts of violence in the future, and that neither imprisonment nor counseling would improve his attitude (Tr. 783).

Agent Robert Lee and Lieutenant Ken Reed testified about the petitioner's reputation for violence in the community, and concerning certain past violent acts committed by him (Tr. 796-97, 800-02).

The defense called Raymond Cloud, Jr., who was a co-worker of the petitioner at a local mobile home factory (Tr.

805). Cloud testified that the petitioner was a good worker, and got along well with his co-workers. He knew of no acts of violence committed by the petitioner (Tr. 806).

The petitioner also called William Broderson, the attorney who represented him in a prior juvenile case, who again testified as to the positive relationship the two had (Tr. 809-10).

The seven-year-old son of the victim was the petitioner's final witness (Tr. 823-33). He testified that the petitioner had never done anything to hurt him (Tr. 832-33).

After hearing the evidence presented during the second stage, the jury determined that the petitioner should receive the death sentence, finding the existence of one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel (Tr. 870).

SUMMARY OF ARGUMENT

I.

In a capital case, the role of the chronological age of a defendant should be confined to that of a mitigating circumstance, and not a complete bar to the execution of a young murderer. Virtually all federal and state courts that have ruled on the issue, have held that the death sentence can be imposed upon a defendant under the age of eighteen. In previous capital cases involving sixteen-year-old defendants, this Court never implied that a state would be precluded from imposing the death penalty.

The complexity of determining the appropriate criminal sanctions for young murderers is another argument against this Court's setting of an arbitrary chronological age regarding the imposition of the death penalty. It is universally recognized that the maturity

level of individual juveniles varies from case to case. Courts have chosen a flexible approach in cases involving the ability of a young person to confess to crimes, to make the abortion decision, and to decide whether to terminate appeals in a capital case. Certification, waiver, and transfer statutes are also evidence of the acknowledgement by most states that individual determinations of criminal responsibility should be made in cases involving young criminals. In capital cases generally, this Court has insisted that individual consideration is to be given to individual defendants.

This Court has also been reluctant to impose rigid rules on state criminal justice systems, and no bright line exists as to what should be the minimum chronological age for imposing the death penalty. The tremendous variance in minimum ages among different states re-

garding the imposition of the death sentence supports that conclusion.

Furthermore, the setting of an arbitrary age, as requested by the petitioner, would violate U.S. Const. art. III principles, since the Court would be deciding future cases involving the imposition of the death sentence upon juveniles without reviewing the facts of each case.

The Supreme Court has consistently refused to create a constitutional definition of criminal responsibility. This is a matter of substantive criminal law that is properly left to the states. In the present case, Oklahoma made a careful finding, by using its certification procedure, that the petitioner should be held accountable for his actions. A state judicial finding that a person is to be held responsible for his actions as an adult should be upheld under the standards of Jackson v. Virginia, 443 U.S. 307 (1979).

The execution of a young murderer serves the same societal purposes as in other capital cases: retribution and deterrence. The facts of certain murder cases involving juveniles show that the moral culpability displayed by those young murderers makes retribution a proper societal response. Also, since there is sufficient evidence to support the belief that young criminals are deterred by appropriate sanctions, the deterrence rationale is properly found. Deterrence is a particularly important objective in view of the significant amount of violent crime that is committed by juveniles in this country.

The execution of young murderers also does not violate proportionality principles of the Eighth Amendment. First, the petitioner in the present case was directly involved in an intentional murder. Second, the objective factors surrounding the execution of juveniles

reveal that legislatures, judicial systems, and juries in this country are not disinclined to impose the death sentence upon juveniles in appropriate cases. Nineteen states permit the execution of a person under the age of sixteen. There are thirty-one persons under the age of eighteen on death rows in fifteen different states in this country. Within the last three years, three seventeen-year-old persons have been executed.

Finally, setting by this Court of a minimum chronological age would prevent subsequent acknowledgement that a different age should be used.

II.

Two photographs entered into evidence during the guilt stage of the trial showed the point of entry of the bullet in the back of the head and the chest. They did not unfairly impassion the jury, nor improperly cause the imposition of the death sentence.

The issue of the photographs is a state evidentiary issue, the admission into evidence of which should not constitute a constitutional violation unless it renders the trial and sentencing so fundamentally unfair as to deny due process. The photographs in the present were corroborative of other testimony, and the trial judge made a specific finding that their probative value outweighed any prejudicial effect.

The aggravating circumstance of especially heinous, atrocious, or cruel was amply supported by the evidence. Therefore, the jury was properly focused on the individual crime, and it cannot be contended that the photographs were the cause of the death sentence in the present case. Furthermore, the fact that the jury refused to find that the petitioner had the propensity to commit criminal acts of violence that would constitute a continuing threat to society

shows that the jury was not acting in a impassioned manner when imposing sentence.

ARGUMENT

PROPOSITION I

THIS COURT SHOULD NOT SET A MINIMUM CHRONOLOGICAL AGE BELOW WHICH A STATE COULD NEVER GO IN IMPOSING THE DEATH PENALTY; SUCH AN INFLEXIBLE STANDARD WOULD BE AN INAPPROPRIATE USE OF THE COURT'S POWER UNDER THE CONSTITUTION SINCE ITS APPROACH SHOULD BE MORE FLEXIBLE REGARDING THE REVIEW OF DEATH SENTENCES IMPOSED BY STATE JUDICIAL SYSTEMS.

A. In a capital case, chronological age should only be a mitigating circumstance, and should not be an absolute bar to the imposition of the death sentence in all cases.

This is the second attempt to have this Court establish, as an aspect of the United States Constitution, a uniform, minimum chronological age for the imposition of the death penalty. See Eddings v. Oklahoma, 455 U.S. 104 (1982). The State of Oklahoma (hereinafter "Oklahoma") submits that while a defendant in a capital case obviously

should be allowed to present chronological age as a mitigating circumstance, the Court should not automatically immunize young murderers of a certain chronological age from the prospect of receiving the death sentence.

This Court, while holding that procedural defects, such as excessively vague sentencing standards, are unconstitutional, "has deferred to the State's choice of substantive factors relevant to penalty determinations." California v. Ramos, 463 U.S. 992, 1001 (1983). Oklahoma contends that as long as the procedural requirement of allowing a murderer to introduce evidence of his or her age as a mitigating factor has been complied with, chronological age should not be used as a substantive bar to the imposition of the death sentence.

In the present case the jury was advised that evidence was offered re-

garding the mitigating circumstance of the existence of youthfulness of the petitioner (J.A. 14). Mitigating circumstances were defined in the instructions (J.A. 23).

Therefore, the jury had the petitioner's age before it, and was not precluded from considering this to be a mitigating circumstance. Cf. Eddings v. Oklahoma, 455 U.S. at 113-14.

Furthermore, the jury was instructed that it must find the existence of one or more aggravating circumstances beyond a reasonable doubt, and that it must unanimously find that any such aggravating circumstances outweighed the finding of one or more mitigating circumstances (J.A. 25). Eddings was complied with, and the Constitution requires nothing more. Eddings, 455 U.S. at 117.

Federal and state courts have been virtually unanimous in rejecting the contention that chronological age alone

bars the imposition of the death penalty. See, e.g., High v. Kemp, 819 F.2d 988, 993 (11th Cir. 1987) (seventeen-year-old); Prejean v. Blackburn, 743 F.2d 1091, 1098-99 (5th Cir. 1984) (seventeen-year-old); Lynn v. State, 477 So.2d 1365, 1380 (Ala. Crim. App. 1984), rev'd on other grounds sub. nom. Ex parte Lynn, 477 So.2d 1385 (Ala. 1985) (sixteen-year-old); Ward v. State, No. CR-59, slip. op. at 8 (Ark. July 20, 1987) (LEXIS, Ark library, Ark file) (fifteen-year-old); State v. Valencia, 124 Ariz. 139, 602 P.2d 807, 809 (1979) (sixteen-year-old); Thompson v. State, 492 N.E.2d 264, 269 (Ind. 1986) (seventeen-year-old); Ice v. Commonwealth, 667 S.W.2d 671, 680 (Ky. 1984) (fifteen-year-old); Johnson v. State, 303 Md. 487, 495 A.2d 1, 19 (Md. 1985) (seventeen-year-old); Trimble v. State, 300 Md. 387, 478 A.2d 1143, 1164 (1984) cert. denied, 469 U.S. 1230 (1985), (seventeen-year-old);

Mhoon v. State, 464 So.2d 77, 83 (Miss. 1985); Cannaday v. State, 455 So. 2d 713, 725 (Miss. 1984) (sixteen-year-old); State v. Battle, 661 S.W.2d 487, 494-95 (Mo. 1983) (eighteen-year-old); State v. Harris, 48 Ohio St. 2d 351, 359 N.E.2d 67, 71-72 (1976) (seventeen-year-old).

Furthermore, in two previous cases involving the death penalty being imposed on sixteen-year-olds, this Court never implied that the age of the defendant would be anything more than a mitigating circumstance. Eddings v. Oklahoma, 455 U.S. 104 (1982); Bell v. Ohio, 438 U.S. 637 (1978). Contra Burger v. Kemp, 107 S.Ct. 3114, 3138-41 (1987) (Powell, J., dissenting). In Eddings, the Court, while holding that state courts must consider all mitigating evidence, and weigh it against the evidence of aggravating circumstances, stated, "[w]e do not weigh the evidence for them." 455 U.S. at 117.

Also, in Hitchcock v. Dugger, 107 S.Ct. 1821, 1824 (1987) the Court, citing Eddings and Skipper v. South Carolina, 106 S.Ct. 1669 (1986), noted: "As in those cases, however, the State is not precluded from seeking to impose a death sentence upon petitioner, 'provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available.'" (Emphasis added).

The complexity of determinating the appropriate criminal sanctions for juveniles also weighs heavily against the Court's setting of a fixed line beneath which a state could never go in determining what is the proper age for assessing the death penalty in a particular case. The fact that different young persons have varying levels of maturity was noted by Justice Powell in his dissent in Fare v. Michael C., 442

U.S. 707, 734, n. 4 (1979), where he observed:

Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully 'streetwise', hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the Court indicated in In re Gault, [citation omitted], the facts relevant to the care to be exercised in a particular case vary widely. They include the minor's age, actual maturity, family environment, education, emotion and mental stability, and, of course, any prior record he might have.

The adoption of the "totality of the circumstances" test regarding the admissibility of juvenile confessions by the majority in Fare is in itself a recognition by the Court of the different types of juveniles a system of justice will confront. The majority in Fare stated that this test "refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive

prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation." 442 U.S. at 725-26.

In The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 119-20 (1967) it was noted:

It is recognized that some youths handled by juvenile courts are hardened, dangerous offenders, while some adults older than the arbitrary upper age level are emotionally and sometimes physically immature individuals

. . . .

. . . No chronological age bracket is uniformly identical or entirely homogeneous.

In Hill, Can the Death Penalty be Imposed on Juvenile: The Unanswered Question in Eddings v. Oklahoma, 20 Crim. L. Bull. 5, 26 (1984) the author stated:

An arbitrary age limit below which the death penalty should never be imposed would be almost impossible to determine with certainty. Many

persons who have no objection to executing a youth of sixteen or seventeen would be horrified at the thought of executing a ten-year-old. Further, if the cutoff age were, for example, to be seventeen years, a hardened and sophisticated sixteen-year-old would escape the death penalty while an immature and impulsive seventeen-year-old would not. Chronological age is an inherently poor criterion by which to determine actual maturity.

(Emphasis added) (footnotes omitted).

Even in Twentieth Century Task Force on Sentencing Policy Toward Young Offenders Confronting Youth Crime 5 (1978)², a report that opposed the death sentence for young murderers, it was stated that "no single age during mid-adolescence should be used as a sharp dividing line for sentencing policies." See also J. Wilson and R. Herrnstein, Crime and Human Nature 145 (1985) (age as a cause of crime "resists explanation because it is so robust a variable").

² This report was cited in Eddings, 455 U.S. at 115, n. 11.

The petitioner cites Bellotti v. Baird, 443 U.S. 622 (1979), to support his contention that this Court recognizes that minors often lack the experience, perception and judgment with regard to certain choices (Br. of Pet. at 20, 23). Bellotti, however, is more supportive of Oklahoma's position since that case required states to establish a system in which a minor could demonstrate that she was mature and well informed enough to make the abortion decision.

This case, coupled with the holding in Fare v. Michael C., (an uncounseled sixteen-year-old juvenile who requested, but was refused permission to see his probation officer, was found to be capable of confessing to a murder), supports the conclusion that states should be given the freedom to make the determination that some fifteen-year-old persons are mature enough to be held criminally responsible for the crime of intentional

murder, and that the death penalty may be appropriate punishment in a particular case.

In Rumbaugh v. Procunier, 753 F.2d 395 (5th Cir. 1985), cert. denied sub. nom. Rumbaugh v. McCotter, 473 U.S. 919 (1985), the court held that a seventeen-year-old person, despite mental illness marked by depression, did not lack the requisite mental competence to waive his right to further judicial review of his conviction and sentence.³

If a young person can be found to be able to voluntarily confess to a murder, to make a decision about whether to have an abortion, or to choose to stop further appeals of his death sentence and be executed, certainly a state judicial system should be able to find that cer-

³ The petitioner in that case, Charles Rumbaugh, was executed on September 11, 1985. NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. 4 (May 1, 1987).

tain juveniles should be held accountable for their actions and, in appropriate cases receive the death sentence, for the act of killing another human being.

The existence of certification, waiver, and transfer statutes in various states is itself a recognition of the desirability of making individual determinations concerning criminal responsibility in cases involving young offenders. This Court has noted that "an overwhelming majority of jurisdictions permit transfer in certain instances." Breed v. Jones, 421 U.S. 519, 535 (1975). The Federal Juvenile Delinquency Act, 18 U.S.C. § 5031 et.seq. also contains a transfer provision for fifteen-year-old offenders. 18 U.S.C. § 5032.⁴ Certification statutes recognize that the

⁴ The age for transfer under this Act was lowered from sixteen to fifteen years of age in 1984.

chronological age of an offender is an artificial and arbitrary line to draw in assessing responsibility for criminal behavior.

The facts of various death cases involving young murders also demonstrate the inappropriateness of setting a minimum chronological age regarding the death penalty.

James Terry Roach, the petitioner in Roach v. Martin, 757 F.2d 1463 (4th Cir. 1985), cert. denied sub. nom. Roach v. Aiken, 106 S.Ct. 645 (1986)⁵ was seventeen years old at the time he murdered the two people in his case. The State's chief forensic psychiatrist testified that Roach was mentally retarded, and it was contended he had Huntington's disease. 757 F.2d at 1473-76; 106 S.Ct. at 646-47 (Marshall, J., dissenting).

⁵ Roach was executed on January 10, 1986. NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. 4 (May 1, 1987).

Christopher Burger was seventeen years old at the time of the murder in his case. A psychologist testified that "he had an I.Q. of 82 and functioned at the level of a 12-year old child." Burger v. Kemp, 107 S.Ct. 3114, 3118 (1987).

Monte Lee Eddings was sixteen years, four months old at the time of the murder in his case.⁶

William Wayne Thompson, the petitioner in the present case, was fifteen years, ten and one-half months old, at the time of the murder in his case (R. 479).⁷

It is apparent from a comparison of these four cases that the chronological age of the four should not be the sole

⁶ Brief for Petitioner at 60, n. 129, Eddings v. Oklahoma, 455 U.S. 104 (1982) (No. 80-5727).

⁷ A psychological evaluation performed August 25, 1982, revealed that the petitioner's I.Q. was 85. (C.Tr. 88-89, Exhibit 3).

basis for deciding whether each young murderer should have received the death sentence. Significantly, Roach, the only one of the four to be executed, had mental problems that seemed to be more severe than those of the other three.

Finally, the petitioner in the present case appears to have committed the more premeditated crime of the four.⁸ Also, the motive for the petitioner's actions is clearer than in the other cases, retribution for the mistreatment of the petitioner's sister by the victim (Tr. 568).⁹

⁸ The petitioner told Donetta Bradford before he left his house, "we're going to kill Charles." (Tr. 685).

⁹ In Solem v. Helm, 463 U.S. 277, 293-94 (1983) the Court stated that a court is entitled to look at a defendant's motive in committing a crime. Also, the fact that the petitioner's victim was a repugnant person should have no bearing on the appropriateness of the death penalty. Cf. Booth v. Maryland, 107 S.Ct. 2529, 2534 n. 8 (1987). The jury in the present case was fully advised about the victim's previous behavior.

The age of a murderer, therefore, is but one of many factors that are to be considered when assessing the death sentence. It should not be the only one.

There is no better statement of what role the age of a defendant should be in a sentencing decision than that made by the court in Trimble v. State, 300 Md. 387, 478 A.2d 1143, 1164 (1984), cert. denied, 469 U.S. 1230 (1985), where it was stated:

We do not hold that the death penalty is constitutionally permissible as applied to all juveniles, nor do we hold that any particular chronological age serves as a bright line under which the death penalty may not be imposed. We simply hold that on the facts of this case, Trimble's age - 17 years and 8 months - does not engage the Eighth Amendment as a shield to capital punishment. We believe that such a case-by-case approach not only affords the accused the individualized consideration warranted in death-penalty cases, but it also avoids the arbitrary line-drawing that is endemic to any hard-and-fast distinction between juveniles and non-juveniles.

Furthermore, in capital cases the Court has stressed the necessity for individualized consideration of defendants. Lockett v. Ohio, 438 U.S. 586, 602-05 (1978). See also Booth v. Maryland, 107 S.Ct. 2529, 2532 (1987) ["a jury must make an 'individualized determination of whether the defendant in question should be executed," (emphasis original)].

This Court has been reluctant to impose inflexible rules on the states' criminal justice procedures. See Barker v. Wingo, 407 U.S. 514, 522-25 (1972) (the Court refuses to set a specific time period within which a defendant must be tried pursuant to speedy trial principles of the Sixth Amendment).

With regard to Eighth Amendment judgments, this Court has refused to become engaged in "the basic line-drawing process that is preeminently the province of the legislature" Rummel v. Estelle, 445 U.S. at 275.

In Rummel, Justice Rehnquist set forth the reasons why the Court was able to draw the line in Coker v. Georgia, 433 U.S. 584 (1977), stating:

Since Coker involved the imposition of capital punishment for the rape of an adult female, this Court could draw a 'bright line' between the punishment of death and the various other permutations and commutations of punishments short of that ultimate sanction. For the reasons stated by Mr. Justice Stewart in Furman, see *supra*, at 272, this line was considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years.

445 U.S. at 275.

Therefore, with regard to the death sentence being imposed on young murderers, chronological age is a poor "bright line" to use, particularly since there is no uniform standard in state judicial systems. See cases cited supra, pp. 36-37. There also is considerable disagreement among state legislatures as to what the minimum age for imposing the death sentence should be. See Br. of Pet., App.

B. Cf. Solem v. Helm, 463 U.S. at 294-95.

This further demonstrates that no bright line exists regarding this issue, and that chronological age should not be the basis of this decision.

Some persons (and states) believe that the age sixteen should be the bright line as to the issue in question. The petitioner argues in his brief that the age of fifteen is too young for the imposition of the death penalty. If the petitioner waited another month and one half before he murdered Charles Keene, he would have been sixteen years of age. The difference of forty-five days between these two ages should not be the basis of constitutional line drawing.

The petitioner himself has not stated what chronological age the United States Constitution sets as the minimum for the imposition for the death sentence, merely requesting the Court to set a "specified" age (Br. of Pet., at 46-49).

The fact that the petitioner cannot say what the "bright line" is in this regard is further proof of its non-existence.

Finally, for the Court to set an arbitrary age that would apply to all future cases would violate U.S. Const. art. III, which requires that there be a case or controversy before the federal judicial power can be invoked. See J. Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw. U.L. Rev. 100 (1985). For the Court to decide, in advance, all capital cases involving juveniles below a certain age would be contrary to the proper function of this Court.

B. The Supreme Court has consistently refused to formulate a constitutional definition of responsibility; that decision should be left to the states, and should be upheld as long as there is sufficient evidence to support that finding.

Another argument against this Court's setting of an inflexible chronological age of criminal responsibility

pertaining to the death penalty, is that the Court has consistently refused to formulate a constitutional definition of criminal responsibility, preferring to leave such a matter to the states.

In Leland v. Oregon, 343 U.S. 790 (1952), the Court refused to invalidate an Oregon law that placed the burden upon the defendant to prove his insanity at the time of the commission of the crime beyond a reasonable doubt, despite the fact that Oregon was the only state placing such a burden on a defendant. The continuing validity of Leland has been reaffirmed in recent years. Patterson v. New York, 432 U.S. 197, 205 (1977); Rivera v. Delaware, 429 U.S. 877 (1976).

The Court in Leland refused to impose a constitutional test of legal insanity upon the states. It held that the "choice of a test of legal sanity involves not only scientific knowledge

but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility." 343 U.S. at 801. The Court declined to require Oregon to adopt the "irresistible impulse" test of insanity.

In Powell v. Texas, 392 U.S. 514 (1968), the Court refused to extend its holding in Robinson v. California, 370 U.S. 660 (1962), stating that "chronic alcoholism" was not a constitutional defense to a criminal charge of public intoxication. It noted that it had never "articulated a general constitutional doctrine of mens rea," 392 U.S. at 535. The Court in Powell refused to embark upon the course of articulating "a constitutional doctrine of criminal responsibility." 392 U.S. at 534.

In Gregg v. Georgia, 428 U.S. 153, 176 (1976) the Court quoted from Powell, noting that "[c]aution is necessary lest this Court become, 'under the aegis of

the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.'"

The same concerns expressed in Gregg and Powell were voiced again in Lockett v. Ohio, 438 U.S. 586 (1978), by Justice Blackmun, concurring, who observed what requiring a state to show an "actual intent to kill", before imposing the death penalty, would mean. He stated:

The requirement of actual intent to kill in order to inflict the death penalty would require this Court to impose upon the States an elaborate 'constitutionalized' definition of the requisite mens rea, involving myriad problems of line drawing that normally are left to jury discretion but that, in disproportionality analysis, have to be decided as issues of law, and interfering with the substantive categories of the States' criminal law. And such a rule, even if workable, is an incomplete method of ascertaining culpability for Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of mens rea.

438 U.S. at 615, n. 2.

If the Court sets a minimum chronological age regarding the imposition of the death sentence, there is no doubt that defendants who are older chronologically would contend that mental or emotional deficiencies place them in the same constitutional category as the fifteen, sixteen, and seventeen-year-old murderers who would be immunized by this Court's decision. Therefore, the Court inevitably would be forced to create a constitutional definition of minimum criminal responsibility. Furthermore, the Court would have to decide whether a different standard applies in capital and non-capital cases.

This Court is the ultimate authority for deciding what degree of intent, if any, is required in a federal prosecution. The holdings in United States v. United States Gypsum, 438 U.S. 422 (1978); United States v. Freed, 401 U.S. 601 (1971); and Morissette v. United

States, 342 U.S. 246 (1952), all reflect the Court's involvement in the determination of the requisite degree of intent in federal cases. Apart from limited intervention in cases involving blatant injustice,¹⁰ however, the Court has considered the mental state of the offender to be the province of state courts, juries, and legislatures.¹¹

The petitioner in the present case was convicted under that portion of Oklahoma's first degree murder statute that

¹⁰ See Lambert v. California, 355 U.S. 225 (1957), where the Court held that a person should not be convicted of violating a city ordinance requiring registration of felons where there was no showing of the probability of knowledge of such an ordinance.

¹¹ Obviously, the state must refrain from shifting the burden of proof to the petitioner, and thus interfering with the constitutional requirement that the state prove every element of a criminal offense beyond a reasonable doubt, e.g., Sandstrom v. Montana, 442 U.S. 510 (1979), and Mullaney v. Wilbur, 421 U.S. 684 (1975). Also, there must be sufficient evidence to support a finding of the requisite intent. Jackson v. Virginia, 443 U.S. 307 (1979).

requires that he act with "malice aforethought" in causing the death of another. Okla. Stat. Ann. tit. 21 § 701.7 (West 1983). The facts of the present case support the jury's finding that the petitioner acted with "malice aforethought" or possessed "a purpose to cause the death of the victim." See Lockett v. Ohio, 438 U.S. at 624 (White, J., concurring).

Furthermore, Oklahoma made a careful and thorough determination, by the use of its certification procedures, that the petitioner was accountable for his intentional act of murder. See supra, pp. 4-12.

Under the Oklahoma law, the certification hearing judge is required to consider six guidelines in determining whether a juvenile should be certified to stand trial as an adult. The State must prove by substantial evidence that the offender is not amenable to treatment in the juvenile system. In re E.O.,

703 P.2d 192, 193 (Okla. Crim. App. 1985); K.C.H. v. State, 674 P.2d 551, 552 (Okla. Crim. App. 1984).

The court is required to make a determination as to "[t]he sophistication and maturity of the juvenile, including his capability of distinguishing right from wrong as determined by consideration of his psychological evaluation, home, environmental situation, emotional attitude and pattern of living." Okla. Stat. Ann. tit. 10, § 1112(b)(3) (West Supp. 1987).

The court is also required to state, in writing, its reasons for certifying the person to stand trial as an adult, and "shall certify that such child shall be held accountable for its acts as if he were an adult" Okla. Stat. Ann. tit. 10, § 1112(b)(6) (West Supp. 1987).

The evidence presented in the present case was more than sufficient to

support the certification court's decision that the petitioner was accountable for his actions and that he acted with "malice aforethought."

The rule of adult criminal responsibility in Oklahoma is set forth in Hair v. State, 532 P.2d 72, 76 (Okla. Crim. App. 1975), which noted that the "well settled" test of criminal responsibility for committing an act which is declared to be a crime is fixed at the point where the defendant "has mental capacity to distinguish between right and wrong, as applies to a particular act, and to understand the nature and consequences of such an act." See also Jones v. State, 648 P.2d 1251, 1254 (Okla. Crim. App. 1982), cert. denied, 459 U.S. 1155 (1982).

In Jackson v. Virginia, 443 U.S. 307 (1979), the Court held that in federal habeas corpus proceedings, federal courts are required to review a

state court conviction to determine whether, when viewed in the light most favorable to the prosecution, a rational factfinder could have found the defendant guilty beyond a reasonable doubt under the applicable state law.

The defendant in Jackson was convicted of first degree murder under Virginia state law. The factual issue in Jackson was whether there was sufficient evidence to support a finding that the defendant had specifically intended to kill the victim. This Court held that "[t]his question . . . must be gauged in the light of applicable Virginia law defining the element of premeditation." 443 U.S. at 324. The Court pointedly rejected the suggestion that the standard set forth would invite intrusions upon the power of the states to define criminal offenses and stated:

Quite to the contrary, the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.

443 U.S. at 324, n. 16. See also Moore v. Duckworth, 443 U.S. 713 (1979), where the Court held that Indiana state law would govern a determination whether the evidence of sanity was sufficient under the Jackson v. Virginia standard.

The record in this case fully supports Oklahoma's findings that the petitioner was accountable for his acts as an adult. The deference that this Court has paid to state decisions regarding the substantive criminal law subject of intent and insanity should apply to a state finding of "accountability," which, if anything, is a more sophisticated decision than that regarding intent.

While intent involves an accused's mental state at the time of the commission of the crime, the "accountability" of a person with regard to his actions may involve the weighing of such matters as his physical development, prior

criminal record, and family environment. Indeed, the six statutory guidelines that the juvenile judge found in the present case demonstrate the complexity of the decision (J.A. 5-8).

At common law those persons who reached the age of fourteen were treated as fully responsible for their acts. W. LaFave and A. Scott, Criminal Law, § 4.11 at 398 (2d ed. 1986). The common law rule has been adopted by statute in Oklahoma. Okla. Stat. Ann. tit. 21 § 152 (West 1983). See also Standards Relating to Juvenile Delinquency and Sanctions, § 15, at 32 (1980) (juvenile delinquency liability should not be imposed if at the time of the conduct charged, as a result of mental disease or defect, the juvenile lacked substantial capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law). The level of criminal responsibility dis-

played by the petitioner in the present case falls within the definitions of such that have previously been set forth.

Oklahoma urges this Court to adopt the Jackson v. Virginia standard for reviewing its finding of "accountability" or "criminal responsibility." The Court should hold that a finding under state law that any person is accountable or criminally responsible for his actions should be upheld absent a finding that, under applicable state law and upon review of the record in the light most favorable to the prosecution, a rational factfinder could not have found the petitioner guilty beyond a reasonable doubt. The determination of criminal responsibility should continue to be left to the states.

If a person is insane at the time of the crime, it is probably cruel and unusual punishment to execute that person for acts committed while he was in that

condition. Cf. Ford v. Wainwright, 106 S.Ct. 2595, 2602 (1986). No one can contend, however, that the petitioner in this case was unable to understand the nature of his actions and the consequences that would result therefrom.

C. The execution of a young murderer is appropriate under the same rationale as that found by this Court in Gregg v. Georgia.

In Gregg v. Georgia, 428 U.S. 153, 183-87 (1976) the Court held that the death sentence is supported by two rationales: retribution and deterrence. Oklahoma contends that these two justifications are just as valid when the murderer is a young person.

1. Retribution.

Regarding the retributive aspect of the imposition of the death penalty upon a young murderer, it cannot be denied that in this country this class of criminals are capable of committing horrifying crimes. The facts of a number of

cases reveal that young murderers are capable of acts of incredible viciousness and cruelty. See e.g., Burger v. Kemp, 107 S.Ct. 3114, 3117-18 (1987); High v. Kemp, 819 F.2d 988, 990 (11th Cir. 1987); Roach v. Martin, 757 F.2d 1463, 1467-68 (4th Cir. 1985), cert. denied sub. nom. Roach v. Aiken, 106 S.Ct. 645 (1986); Stanford v. Commonwealth, _____ S.W.2d _____ (Ky. 1987);¹² Magill v. State, 386 So.2d 1188, 1189 (Fla. 1980), 428 So.2d 649 (Fla. 1983), cert. denied, 464 U.S. 865 (1983); Ice v. Commonwealth, 667 S.W.2d 671, 672-73 (Ky. 1984), cert. denied, 469 U.S. 860; State v. Rushing, 464 S.2d 268 (La. 1985), cert. denied, 106 S.Ct. 2258 (1986); Johnson v. State, 303 Md. 487, 495 A.2d 1, 7-8 (1985), cert. denied, 106 S.Ct. 868 (1986); Trimble v. State, 300 Md. 387, 478 A.2d 1143, 1164 (1984),

¹² The seventeen-year-old defendant in this case is the co-defendant of the petitioner in Buchanan v. Kentucky, 107 S.Ct. 2906 (1987).

cert. denied, 469 U.S. 1230 (1985); Tokman v. State, 435 S.2d 664, 666-67 (Miss. 1983), cert. denied, 467 U.S. 1256 (1984); State v. Lashley, 667 S.W. 2d 712, 713-14 (Mo. 1984), cert. denied, 469 U.S. 873; Cannon v. State, 691 S.W. 2d 664, 667-69 (Tex. Crim. App. 1985), cert. denied, 106 S.Ct. 897 (1986); Garrett v. State, 682 S.W.2d 301 (Tex. Crim. App. 1984), cert. denied 471 U.S. 1009 (1985); Pinkerton v. State, 660 S.W. 2d 58, 59-61 (Tex. Crim. App. 1983).

One who reads the facts of these cases cannot think but that state judicial systems are justified in believing that these crimes "are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg, 428 U.S. at 184.

Obviously, there is little, if any, retributive value in "executing a person who has no comprehension of why he has been singled out and stripped of his

fundamental right to life." Ford v. Wainwright, 106 S.Ct. 2595, 2602 (1986). In the present case, however, the petitioner fully comprehended what he was doing and later expressed pride in what he had done (Tr. 568, 575, 576, 647, 684, 685, 687).

This Court has also noted that the retributive aspect of the death sentence "is less strong with respect to a defendant who played a minor role in the murder for which he was convicted." Sumner v. Shuman, 107 S.Ct. 2716, 2727 (1987). See also Solem v. Helm, 463 U.S. 277, 296 (1983) (the Court, in applying proportionality principles, observed that the crime in that case involved a "passive" felony).

In Tison v. Arizona, 107 S.Ct. 1676, 1683 (1987) the Court held that "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culp-

ability of the criminal offender." The Court also noted that "[a] critical facet of the individual determination of culpability required in capital cases is the mental state with which the defendant commits the crime" and that "the more purposeful is the criminal conduct, the more serious is the offense" Id. at 1687. See also Sumner v. Shuman, 107 S.Ct. at 2724 ("the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime."); and Booth v. Maryland, 107 S. Ct. 2529, 2533, (1987) (factors regarding the death sentence "must be scrutinized to ensure that the evidence has some bearing on the defendant's 'personal responsibility and moral guilt.'")

In Enmund v. Florida, 458 U.S. 782, 800 (1982) the Court observed:

As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability

- what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention - and therefore his moral guilt - to be critical to "the degree of [his] criminal culpability," Mullaney v. Wilbur, 421 U.S. 684, 698 (1975), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrong-doing.

See also Skipper v. South Carolina, 106 S.Ct. 1669, 1675 (1986) ("Society's legitimate desire for retribution is less strong with respect to a defendant who played a minor role in the murder. . .").

In the present case the facts reveal the petitioner's direct, personal involvement in the murder of the victim. Therefore, under the principles of retribution set forth above, his "personal culpability" certainly justifies the retributive aspect of the death sentence.

2. Deterrence.

As to the deterrence aspect, in Gregg, the Court noted that the murders

most likely to be deterred are those "carefully contemplated murders, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act" (footnote omitted). 428 U.S. at 186. As noted previously, there is no question that the petitioner's acts were calculated.

There is no reason to think that the deterrent aspect of the death sentence would not deter some would-be young murderers. As the court stated in Trimble v. State, 300 Md. 387, 478 A.2d 1143, 1164 (1984) cert. denied, 469 U.S. 1230 (1985):

This is not a case like Enmund where the deterrent function of the criminal law could not operate because the defendant did not intend to kill the victim. Trimble's culpability level was unaffected by his age, which was only four months from the age of majority. Imposition of the death penalty in this instance will send a message to others contemplating similar acts that society will respond harshly to their actions. In short, we believe that seventeen-year-old youths can be deterred from committing brutal rape-murders, so the legislature's judgment in that regard is not a purposeless act.

In B. Boland and J. Wilson, Age, Crime and Punishment, 51 Pub. Interest 22, 26 (1978), the authors noted that "young males commit more crimes than older males," and disagreed with the concept of imposing the most severe punishment on older criminals, since they are nearing the end of their criminal careers.¹³ The authors observed that "sanctions do affect crime rates, other things being equal." Id. at 33.

Other experts and studies have concluded that sanctions are a deterrent to juvenile crime. See R. Fine, Escape of the Guilty 160-74 (1986); N.Y. Times, Mar. 5, 1982, at B1, col. 2.

Therefore, Oklahoma contends that it is appropriate for legislatures and courts to be permitted to impose the ultimate punishment on juveniles, if

¹³ In J. Wilson and R. Herrnstein, Crime and Human Nature 143 (1985) the authors note that "[i]n general the tendency to break the law declines throughout life."

those entities believe that it may deter violent juvenile crime, which constitutes a significant and growing portion of violent crime in America.¹⁴

In this age of television, it cannot be said that young persons will not be made aware of the potential consequences of intentional murder. Furthermore, young murderers can be expected to commit crimes in such a way that will facilitate their escape, and the possible murder of witnesses is one of the primary justifications for the death sentence. See High v. Kemp, 623 F.Supp. 316, 317 (S.D. Ga. 1985), aff'd. 819 F.2d 988

¹⁴ See B.Boland and J. Wilson, Age, Crime, and Punishment, supra at 22 ("It is well known that young males commit a disproportionately large share of many serious crimes."). The F.B.I. Uniform Crime Reports 190 (1979), reveal that during the period from 1970-1979, violent crime arrests of persons under the age of eighteen rose 41.3%. In the most recent report, F.B.I. Uniform Crime Reports 12 (1986), it is noted that murder arrests for persons under the age of eighteen increased 9% in the year 1985-86. The same report reveals that 30% of the Crime Index offenses are committed by persons under the age of eighteen. Id. at 163.

(11th Cir. 1987) (seventeen-year-old and his two accomplices planned an armed robbery with the express purpose of eliminating any witnesses); and Mhoon v. State, 464 So.2d 77, 79 (Miss. 1985) (eighteen-year-old advised his sixteen-year-old accomplice to the murder that "[t]he best witness is a dead witness").

In Gregg v. Georgia, 428 U.S. at 186, the Court noted that

"[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

For the reasons stated, Oklahoma contends that the deterrence rationale is appropriate in the present case.

D. The imposition of the death penalty in the present case does not violate the proportionality principles of the Eighth Amendment and is supported by objective factors.

Oklahoma also contends that Eighth Amendment proportionality principles do

not prohibit the imposition of the death penalty upon a young murderer who is aware of what he is doing.

This Court has rarely invoked the principle of disproportionality to strike down sentences. One writer has noted that Coker v. Georgia, 433 U.S. 584 (1977) marked the first time since Weems v. United States, 217 U.S. 349 (1910) that the Supreme Court has relied upon disproportionality principles to invalidate a punishment under the Cruel and Unusual Punishment Clause. Radin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause, 126 U.Pa.L.Rev. 989, 990 (1978). But see Solem v. Helm, 463 U.S. 277 (1983) (sentence was disproportionate where sentence was life without possibility of parole, and the defendant had engaged only in minor criminal conduct) and Edmund v. Florida, 458 U.S. 782 (1982).

In Solem, the Court noted that "[i]n view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." 463 U.S. at 290, n. 16. The Court also stated that objective criteria involved the gravity of the offense, which included the magnitude of the crime and the culpability of the offender. Id. at 292.

The crime committed by petitioner involved the intentional taking of another human life. While it is correct to say that the penalty of death is unique as a punishment, Furman v. Georgia, 408 U.S. at 306 (Stewart, J., concurring), murder is incomparable as a crime. In Coker v. Georgia, 433 U.S. at 598, the Court observed that, despite the reprehensible nature of the crime

of rape, "it does not compare with murder."

Furthermore, the murder in the present case was an intentional killing where the petitioner was a direct participant.¹⁵ This is not a situation where the petitioner was merely an accomplice during felony murder. Cf. Tison v. Arizona, 107 S.Ct. 1676 (1987); and Enmund v. Florida, 458 U.S. 782 (1982).

In Coker v. Georgia, 433 U.S. 584, 592 (1977), Justice White stated:

[T]hese Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence - history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted

A review of the objective factors regarding the execution of persons fif-

¹⁵ The petitioner advised friends that he both cut the victim's throat and shot him (Tr. 634-35, 687-88).

teen years of age at the time of the commission of the crime supports Oklahoma's statutory scheme allowing such executions. First, this Court has viewed the actions of the various state legislatures as the most important index of contemporary society's view of a particular punishment. In Gregg v. Georgia, 428 U.S. at 179, the Court stated that the legislative response to Furman v. Georgia, 408 U.S. 238 (1972), was "[t]he most marked indication of society's endorsement of the death penalty"

In this country nineteen states permit the execution of a person who is under the age of sixteen at the time of the murder.¹⁶ This obviously represents

¹⁶ Br. of Pet., App. B. at 2b-3b. Although the petitioner's brief lists twenty states that fall within that category, it appears that Kentucky's minimum age for execution is now sixteen. Ky. Rev. Stat. Ann. § 640.040(1) (Supp. 1987). There seems to be no conclusive trend toward either the raising or lowering of the minimum age. In 1981, Idaho lowered the age of criminal responsibility, and therefore lowered the minimum age at which a person could receive the death sentence. Idaho Code

a high percentage of the thirty-five states that presently have death penalty statutes.

In Coker v. Georgia, 433 U.S. at 595-96, Court relied heavily on the fact that "Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman. . . ." See also Rummel v. Estelle, 445 U.S. 263, 280, n. 22 (1980).

Furthermore, at the present time there are thirty-one persons on death row for crimes committed while under the

16 (continued) § 16-1806A(1) (Supp. 1987). Montana also lowered its minimum age for both criminal responsibility and the death sentence in 1985 from ten years to sixteen years. Mont. Code Ann. § 41-5-206(1)(a) (Supp. 1987). In 1987, Indiana raised its minimum age for the death sentence from ten years to sixteen years. Ind. Code Ann. § 31-6-2-4 (signed by Governor on April 6, 1987).

age of eighteen.¹⁷ Therefore, it is obvious that American juries are not disinclined to impose the death penalty upon young murderers in appropriate cases. This is particularly true because those convicted murderers have been sentenced by juries in fifteen different states.

While the number of persons sentenced to death in this age category is not extremely large, it is indicative of the fact that the imposition of death under these circumstances is not unknown. In Coker v. Georgia, 433 U.S. at 597, the Court stated that the fact that Georgia juries had sentenced six rapists to

¹⁷ Br. of Pet., App. F. The petitioner's brief lists thirty-two such persons, but recently in Ward v. State, No. CR 86-59, slip op. (Ark July 20, 1987) (LEXIS, Ark library, Ark file) the Arkansas Supreme Court reversed the conviction and death sentence of Donald Ward, who was fifteen years old at the time of the crime. The court, however, held that the imposition of the death sentence upon a person that age was not unconstitutional. Id. at 8.

death since 1973 was "not a negligible number; "

Furthermore, Oklahoma contends that the addition of more juveniles to death rows in America would be an inappropriate basis for upholding the imposing of the death sentence upon some young murderers. The fact that state judicial systems have not sent every juvenile murderer to death row should not be held against them, and they should continue to have considerable latitude in selecting the appropriate recipients of the death penalty.

Also, the fact that two federal circuit courts of appeal, and supreme courts in a number of states have upheld death penalties for young murderers shows that state judiciaries are not offended by the imposition of the death sentence upon this class of murderer. See cases cited supra, pp. 36-37.

Additionally, in the past two years, two different states have executed persons who were seventeen years

old at the time of the commission of the crime.¹⁸ This is further proof that the public is not offended by the executions of young murderers, particularly since there has been no evidence of a public outcry against these executions, and neither state changed its law after such.

In Hill, Can the Death Penalty Be Imposed on Juveniles: The Unanswered Question in Eddings v. Oklahoma, 20 Crim. L. Bull. 5, 23 (1984), the author observed that

the views of society regarding capital punishment for juveniles do not rise to the level of widespread or general rejection. At this time, societal attitudes are too vague and unclear to rise to constitutionally significant dimensions.

(footnote omitted).

¹⁸ Charles Rumbaugh in Texas on September 11, 1985; James Terry Roach in South Carolina on January 10, 1985; and Jay Pinkerton in Texas on May 15, 1986. NAACP Legal Defense and Educational Fund, Inc., Death Row U.S.A. 4 (May 1, 1987).

Finally, although the question of how frequently capital punishment of juveniles has been imposed is subject to debate, there is precedent under both American and English law for executing young murders. Compare Note, Capital Punishment for Minors: An Eighth Amendment Analysis, 74 J. Crim. L. and Criminology, 1471, 1475 (1983) and Hill, Can the Death Penalty Be Imposed on Juveniles: The Unanswered Question in Eddings v. Oklahoma, 20 Crim. L. Bull. 5, 9-10 (1984) with Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Clev.St.L.Rev. 363, 376 (1986). See also 4 W. Blackstone, Commentaries *23-24.

Against the common law precedent, the array of states that have set fifteen or below as the age of ultimate criminal responsibility, and the absence of a "bright line" with which to guide this Court as in Coker v. Georgia, the petitioner bases his argument essentially

upon humanitarian principles. As the legal foundation for his position, the petitioner sets forth authority such as statutes relating to marriage and contract laws, international treaties, and the death penalty laws of other countries.

Oklahoma contends, however, that its power as a state to determine the appropriate age of criminal responsibility for such an act as committed by the petitioner should not be limited by such authority and that previous decisions of this Court interpreting the Eighth Amendment allow Oklahoma such a legislative and judicial judgment.

In Patterson v. New York, 432 U.S. 197, 201 (1977), the Court noted:

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, Irvine v. California, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.

With regard to the recitation of the treaties referred to, and the laws of other countries regarding the death penalty, Oklahoma can find no better response than the statement of Justice Harlan in McGautha v. California, 402 U.S. 183, 221 (1971) (quoted in Lockett v. Ohio, 438 U.S. 586, 632-33 [1978], Rehnquist, J., concurring in part and dissenting in part), who noted:

It may well be, as the American Law Institute and the National Commission on Reform of Federal Criminal Laws have concluded, that bifurcated trials and criteria for sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court.

Furthermore, regarding the humanistic basis for arguing that the death sentence should not be imposed upon any

young murderer regardless of how savage the crime, Oklahoma contends that a state should be able to decide that it is more in danger of being engulfed by barbarism by not adequately responding to horrible murders, than it would be by executing juvenile murderers in appropriate cases.

The petitioner has relied heavily on sociological studies in his brief in requesting the Court to impose a fixed, chronological age of criminal responsibility upon half of the states that have the death penalty. This Court, however, has apparently moved away from the heavy reliance on sociological sources such as were used in In re Gault, 387 U.S. 1 (1967). See Streib, From Gault to Fare and Smith: The Decline in Supreme Court Reliance on Delinquency Theory, 7 Pepperdine L. Rev. 801 (1980). The de-emphasis on sociological studies in determining constitutional principles

is consistent with the concept that Eighth Amendment judgments "should be informed by objective factors to the maximum possible extent." Coker v. Georgia, 433 U.S. at 592. Reliance on sociological data is an invitation to invoke one's subjective viewpoint, since sociological studies can support any number of perspectives.¹⁹ In Rummel v.

¹⁹ The petitioner urges that the prospects for rehabilitation must be considered before a sentencer can impose the death sentence upon a young murderer. (Br. of Pet. 37). Recent studies show, however, that rehabilitative efforts in the juvenile area have had tremendous failures. N.Y. Times, Mar. 5, 1982, B.4, col. 1-3; Law Enforcement Assistance Administration, U.S. Dept. of Justice, Reports of the National Juvenile Justice Assessment Centers, Juvenile Delinquency Prevention Experiments: Review and Analysis (1980); R. Fine, Escape of the Guilty, 164-65 (1986). Indeed, studies note that the results of the Cambridge-Somerville Youth Project showed that the study group which received years of intensive counseling fared worse than the study group that received no special attention. Law Enforcement Assistance Administration, U.S. Dept. of Justice, supra, at 24.

Other studies have shown that chronic juvenile offenders, a group within which the petitioner in the present case seems to fall, not only commit most of the crimes committed by

Estelle, 445 U.S. 283-84, the Court noted that the fact that penologists themselves have disagreements with regard to sentencing policy reinforced the Court's conviction that any "'nationwide trend' toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts."

This Court has repeatedly recognized that "we may not act as judges as we might as legislators," Gregg v. Georgia, 428 U.S. at 175 (Stewart, J., plurality opinion), and that the Constitution has not given this Court a "roving commission" to impose upon the states its own notion of enlightened policy. Rummel v. Estelle, 445 U.S. at 285 (Stewart, J., concurring). Reviewing courts "should

¹⁹ (continued) juveniles, but generally continue to commit crimes as adults. Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, Delinquency in Two Birth Cohorts: Executive Summary at iii, 24 (1985).

grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments as well as to the discretion that trial courts possess in sentencing convicted criminals." Solem v. Helm, 463 U.S. at 290.

The setting by this Court of an arbitrary, minimum chronological age for which a person could receive the death penalty would foreclose the possibility of later recognition that the age should be set at a lower point.²⁰ If the Supreme Court makes that determination, "[r]evisions cannot be made in the light of further experience." Gregg v. Georgia, 428 U.S. at 176.

²⁰ In 1971, the Senate Joint Resolution that was passed in support of U.S. Const. amend. XXVI (which lowered the voting age to eighteen), noted that "Dr. Margaret Mead and others have shown that the age of physical maturity of American youth has dropped more than three years since the eighteenth century." S.J. Res. 7, 92d. Cong., 1st Sess. (1971), reprinted in 1971 U.S. Code Cong. & Admin. News, 931, 935.

PROPOSITION II

THE ADMISSION INTO EVIDENCE OF COLOR PHOTOGRAPHS OF THE VICTIM, WHICH SHOWED THE POINTS OF ENTRY OF THE TWO BULLETS, DID NOT RENDER THE TRIAL OR SENTENCING OF THE PETITIONER SO FUNDAMENTALLY UNFAIR AS TO DENY DUE PROCESS.

The petitioner contends that his constitutional rights were violated by the admission into evidence of two color photographs, which were admitted into evidence during the guilt stage of the trial (Tr. 626-28). Oklahoma contends that this is a state evidentiary question, and there is no showing that the admission of the evidence has rendered the trial so fundamentally unfair as to deny due process.

Perusal of these two photographs, which were State's Exhibits Nos. 10 and 11, reveal their probative value. These photographs show that the victim was shot in the back of the head and the chest, and therefore are corroborative

of other trial testimony concerning the cause of death (Tr. 655-56, 666-67). Furthermore, the trial judge made a specific finding that their probative value outweighed any prejudicial effect (Tr. 627-28).

In Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974), the Court stated that not every trial error or infirmity which might call for the application of supervisory power constitutes a failure to observe fundamental fairness essential to the very concept of due process, citing Lisenba v. California, 314 U.S. 219, 236 (1941). The Court in Donnelly noted that when specific guarantees of the Bill of Rights are involved, the Supreme Court has taken special care to insure that prosecutorial conduct in no way impermissibly infringes upon them. Id. at 643. The Court stated, however, regarding an alleged trial error, that constitutional error would not be found

unless the error so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id.

The Court recently held in two state criminal cases that the alleged trial errors did not meet this requirement. Darden v. Wainwright, 106 S.Ct. 2464 (1986) (prosecutors closing arguments were not fundamentally unfair); and Holbrook v. Flynn, 106 S.Ct. 1340 (1986) (security force present in courtroom was not prejudicial).

This Court has never ruled on the admissibility of allegedly gruesome photographs in a criminal trial. Cf. Lisenba v. California, 314 U.S. at 227-29 (the Court rejects contention that bringing two rattlesnakes in the courtroom prejudiced the defendant's rights). The United States Court of Appeals for the Fifth Circuit, however has reviewed a due process claim involving photographic evidence. In Mercado v. Massey, 536

F.2d 107, 108 (5th Cir. 1976), the court rejected the petitioner's claim that the photographs of the deceased's body so inflamed the jury as to deny him a fair trial, holding that the "admissibility of these photographs. . . was an evidentiary question for the state trial judge." The court, citing Lisenba v. California, 314 U.S. at 227-28, acknowledged that "[f]ederal courts do not sit to review state evidentiary questions". 536 F.2d at 108.

Regarding the petitioner's contention that the admission of the photographs violated his rights regarding the imposition of punishment, Oklahoma submits that the exhibits had no crucial or significant impact upon a finding of the aggravating circumstance that the murder was especially heinous, atrocious or cruel.

In the present case the Oklahoma Court of Criminal Appeals found that the

evidence in this case was strong. Thompson v. State, 724 P.2d 780, 783 (Okla. Crim. App. 1986). A review of the facts set forth earlier in this brief show that this finding is obviously accurate.

The jury instruction defining this aggravating circumstance read as follows:

The phrase "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

[Emphasis added] (J.A. 21)

The evidence of serious physical abuse in this case is overwhelming. A subsequent autopsy of the body revealed that death was caused by gunshot wounds to the head and the chest (Tr. 667). Other injuries to the body indicated cuts on the left side of the chest, a seventeen centimeter cut on the neck and throat which was about one-half inch in depth, a broken shin bone in the lower

left leg, and multiple abrasions and wounds on the body, particularly on the victim's face and about his arms (Tr. 661).

Considering the evidence of serious physical abuse in this case, Oklahoma contends that the admission of the photographs did not prevent the petitioner from having a fundamentally fair trial at either stage.

Further evidence that the photographs did not unfairly impassion the jury is the fact that the jury found the existence of only one of the two aggravating circumstances instructed by the court (J.A. 20; Tr. 870). Since the jury declined to find that the petitioner had the propensity to commit criminal acts of violence that would constitute a continuing threat to society, it can hardly be argued that the photographs caused the jury to act irresponsibly in this case.

Finally, for this Court to hold that the photographs in the present case were improperly admitted would require the Court to decide the prejudicial impact of photographs in other death penalty cases.

CONCLUSION

For the reasons stated, it is respectfully requested that the judgment and sentence of the Oklahoma Court of Criminal Appeals be affirmed.

Respectively submitted,

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GENERAL

No. 86-6169

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WILLIAM WAYNE THOMPSON, *Petitioner*,

v.

STATE OF OKLAHOMA, *Respondent*.

On Writ Of Certiorari To The Court Of Criminal Appeals
Of The State Of Oklahoma

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Introduction

The traditions of American jurisprudence that children and adolescents are to be judged more carefully and treated less harshly than adults are ignored by the Brief of Respondent Oklahoma almost as completely as by the trial and appellate courts in proceedings below.¹ Over sixty percent of American jurisdictions—thirty-three jurisdictions encompassing over 70% of the American population—refuse to countenance the execution of anyone for a crime committed at age fifteen or younger.² No State that has decided to adopt an express statutory minimum age for imposing a death penalty has ever selected an age below sixteen years.³ No State has executed any person for a crime committed at age fifteen or younger in almost forty years.⁴

The basic power of the States to execute convicted murderers is *not* at stake in this case. This case focuses on a small category of death penalty cases and only one

¹ Certainly, the arguments of Oklahoma reflect the attitude of the Oklahoma Court of Criminal Appeals, which devoted all of two short paragraphs to the issue of the boy's youth. Only one sentence of the appellate court's opinion in this case was devoted to a "reconsideration" of whether a death sentence imposed on a juvenile violated the Eighth Amendment. *Thompson v. State*, 724 P.2d 780, 784 [J.A. 36, 41].

² As of 1985, the eighteen jurisdictions that prohibit a death sentence for anyone younger than eighteen, seventeen or sixteen (See Appendices A and B to this Brief) and the fifteen jurisdictions that do not have any death penalty included an estimated 71.9% of the total United States population. Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States* 22 (1987).

³ See Appendix A to this Brief.

⁴ The last execution of a person for a crime committed at age fifteen was on January 9, 1948 when Louisiana executed Irvin Mattio. V. Streib, *Death Penalty for Juveniles* 197 (1987).

aspect of the death penalty issue: State execution of children and adolescents is freakishly rare and inconsistent with the dominant traditions of America's criminal and juvenile jurisprudence. To divert attention from these facts, the State of Oklahoma contends that Petitioner's claims under the Eighth and Fourteenth Amendments would deprive the States of their general responsibility for defining substantive standards of criminal law. Brief of Respondent Oklahoma at 52-65. Unless the presence of any constitutional limitation on the death penalty process is a similar interference with the whole of the States' legitimate, broad powers in this area, Oklahoma's argument is false.

Citing *Jackson v. Virginia*, 443 U.S. 307 (1979), Oklahoma argues in favor of a rule it believes to be pertinent: A state court's finding that a person is criminally responsible should be upheld, unless, under applicable state law and upon review of the record in a light most favorable to the prosecution, a rational fact finder could not have found the defendant guilty beyond reasonable doubt. Brief of Respondent Oklahoma at 64. Oklahoma emphasizes that its procedures were constitutionally adequate to conclude that the boy ought to be punished for his intentional act of murder. Brief of Respondent Oklahoma at 58. Oklahoma's argument is that the State has applied a proper rule of criminal responsibility—whether the accused had mental capacity to distinguish between right and wrong. *Id.* at 60.

Petitioner concedes all this: Petitioner does not challenge Oklahoma's decision to hold him accountable under the State's criminal laws as if he were an adult. This case presents no question about whether Oklahoma was correct in its decision that the boy was guilty. The issue is not whether the boy will be held accountable for his crime. If this court holds in favor of Petitioner's claims, there is no

doubt that the boy will be punished—and punished severely—with a life imprisonment sentence. The question is whether he should suffer the extreme penalty of death. See *Amici Curiae Brief of Child Welfare League of America et al.* at 33-41. Oklahoma's defense of judicial deference to state court judgments regarding criminal responsibility has virtually nothing to do with the issues of this case.

If Oklahoma meant to go one step further and to argue that standards for reviewing a death sentence ought to be identical to standards for reviewing a State's finding of criminal accountability, Oklahoma ignores fundamental constitutional limitations on the death penalty process.

Oklahoma is repeating its argument, expressed and rejected in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), that the only factors that could justify reducing a sentence of death—as a matter of constitutional law—are those “which would tend to support a legal excuse from criminal liability.” *Id.* at 113. In other words, in Respondent's view, if a defendant is guilty of intentional murder, and if that defendant knows the difference between right and wrong, the death penalty is constitutionally appropriate in the absence of some legal excuse. Brief of Respondent Oklahoma at 64-65.

If this is Oklahoma's position, it is extreme. It concedes little to the well-established principle that

[B]ecause there is a qualitative difference between death and any other form of punishment, “there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”

Zant v. Stephens, 462 U.S. 862, 884 (1983), quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Oklahoma's analysis concedes nothing to the legal fact

that the boy was a child under the laws of Oklahoma, and it concedes little to the special difficulties of a case in which the State seeks to decide whether a child "has lost his moral entitlement to live." *Spaziano v. Florida*, 468 U.S. 447, 469 (1984) (Stevens, J., dissenting).

I. OKLAHOMA'S ARGUMENT BEFORE THIS COURT WOULD, IF ADOPTED, UNDERMINE WELL-ESTABLISHED TRADITIONS THAT YOUTH BEARS ON THE FUNDAMENTAL JUSTICE OF THE DEATH PENALTY.

Despite this Court's affirmation that youth is a "relevant mitigating factor of great weight," *Eddings v. Oklahoma*, 455 U.S. at 116, Oklahoma's brief before this Court makes virtually no effort to demonstrate that the boy's youth was carefully and sensitively considered by jury, trial judge or appellate court. Oklahoma's argument before this Court mirrors the reality that Oklahoma courts never reviewed this case in light of this Court's insistence that youth bears directly on the fundamental justice of the death penalty. *Skipper v. South Carolina*, ___ U.S. ___, 106 S.Ct. 1669, 1676 (1986) (concurring opinion of Powell, J., Burger, C.J., and Rehnquist, J.). The State's arguments before this Court are only an attempt to rationalize Oklahoma's uncommon willingness to impose a death penalty despite the youth of the offender.

A. Oklahoma's Argument, If Adopted, Would Undermine *Eddings v. Oklahoma* By Legitimizing Unbridled Jury Discretion Without Adequate Guidance That "Youth Is A Relevant Mitigating Factor Of Great Weight."

Oklahoma makes only one begrudging concession to the tradition that youthful offenders might not deserve to be treated in the same way as adults. It recognizes the "procedural requirement of allowing a murderer to introduce

evidence of his or her age as a mitigating factor." Brief of Respondent Oklahoma at 34. In Oklahoma's view, as long as the accused is not foreclosed from introducing evidence and argument regarding age and other mitigating circumstances, the jury and the state courts have virtually unrestricted discretion to sentence a child to death. *Id.* at 35.

Oklahoma's toleration of unrestricted jury choice violates constitutional principles that limit the death penalty process. "[A] jury's discretion to impose the death sentence must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Booth v. Maryland*, ___ U.S. ___, 107 S.Ct. 2529, 2532 (1987) quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, J., Powell, J., and Stevens, J.). States who seek to put criminals to death "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' " to the jury. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion of Stewart, J., Blackmun, J., Powell, J. and Stevens, J.) (citations omitted). The need for precision and objectivity "is particularly acute" when the responsibility of a child or adolescent is at issue. *Burger v. Kemp*, ___ U.S. ___, 107 S.Ct. 3114, 3141 (1987) (Powell, J., dissenting).⁵ "The Constitution requires that a capital sentencing system reflect this difference in criminal responsibility between children and adults." *Id.*

When responding to the prospect of a minimum death penalty age, Oklahoma says that it favors a case-by-case assessment of youth as a mitigating circumstance. Yet the

⁵ "A specific inquiry including 'age, actual maturity, family environment, education, emotional and mental stability, and . . . prior record' is particularly relevant" when a state seeks to impose a death sentence on a juvenile. *Burger v. Kemp*, 107 S.Ct. at 3140 (Powell, J., dissenting).

State offers virtually no assurance that consideration of this "relevant mitigating circumstance" was meaningful, adequate or reliable as the jury deliberated in this matter of the boy's life and death.

Respondent Oklahoma makes no effort to deny: (i) The trial court failed to explain to the jury that youth is a relevant mitigating factor of great weight; (ii) The trial court misled the jury as to the boy's status as a child under the laws of Oklahoma; (iii) The prosecutor tried to condition the jury into believing that the boy's youth should not "interfere" with its deliberations; (iv) The trial court did nothing to require the jury to weigh the boy's youth against aggravating factors, and instructed the jury instead that "the determination of what are mitigating circumstances is for you as jurors to resolve"; and (v) The jury exhibited confusion about the meaning of "mitigating" circumstances.

Oklahoma's inability to show how the boy's age affected the proceedings below in any way is significant. In this case, the jury had no "substantive guidelines [to] allow[] the sentencer to make rational, objective distinctions between the egocentric homicidal conduct of a juvenile murder, and the homicidal conduct of an adult murderer." Ellison, "State Execution of Juveniles: Defining 'Youth' as a Mitigating Factor for Imposing a Sentence of Less Than Death", 11 *Law and Psych. Rev.* 1, 36-37 (1987).

If the factor of youth is to be given proper weight in capital sentencing decisions, the jury (or other sentencing authority) must be, first, informed of the importance of youth as a mitigating circumstance, and, second, directed to give the youth factor great weight in sentencing deliberations. Only such safeguards in a young offender's case can meet the "corresponding[ly] . . . [greater] need for reliability in the determination that death is the appropri-

ate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. at 305.

B. A Minimum Chronological Age Would Protect The Tradition That Young Offenders Must Be Judged Differently And Treated Less Harshly Than Adults Who Commit The Same Offenses.

Oklahoma contends that the justice of the death penalty must be assessed on a case-by-case basis, without *any* minimum chronological limit. Such a minimum age would, in Respondent's view, prevent the states from making careful, individualized judgments. Oklahoma argues that young offenders as a group are too diverse in their levels of emotional and moral maturity to permit an age-based line to be drawn between those who should be exempt from the death penalty and those who should not.

Oklahoma ignores crucial facts known and consistently accepted by this Court about young people. While human beings are still adolescents, they share common emotional and intellectual features which distinguish them as a class from adults. Because children and adolescents are fundamentally different than adults, American jurisprudential traditions treat the young differently—as a class.⁶ Unless these traditions are to be ignored, the well-known,

⁶ As the American Bar Association as Amicus Curiae wrote:

Our society recognizes that minors are less mature, less experienced, less able to exercise good judgment and self-restraint, more susceptible to environmental influence (both positive and negative), and as a result, less responsible and less culpable in a moral sense than adults.

Brief of Amicus Curiae American Bar Association at 3. *See also* Brief of American Society for Adolescent Psychiatry and American Orthopsychiatric Association As Amici Curiae at 3-8; Brief of Child Welfare League of America et. al. as Amici Curiae at 28-32 and 43-53; Brief of National Legal Aid and Defender Association et. al as Amici Curiae at 5-21.

widely-accepted differences between adolescents and adults compel the conclusion that the death penalty is a cruel and unusual punishment for youthful offenders.⁷

Of course, it is true that young people grow in different ways and at different rates. Still, Oklahoma is not really arguing that it seeks the death of only the most mature and the most responsible of youthful offenders. On the contrary, in the case at bar, Oklahoma takes a position consistent with its argument in *Eddings v. Oklahoma*, in which Counsel for Respondent explicitly defended the position that emotional maturity is not essential to war-

⁷ Respondent and its Amici suggest that drawing an age-based line is "wholly arbitrary," despite the fact that half of the death penalty states have drawn minimum lines that bar death sentences for fifteen-year-olds. See Appendices A and B to this brief.

An age-based line would not be arbitrary. A minimum chronological age, such as eighteen years, would serve a purpose. An age limit would protect the explicit constitutional value against cruel and unusual punishment. This value must be understood and interpreted in light of this nation's traditions, which, in this case, require a decent restraint in the judgments and punishments of the young.

This Court has found it proper to draw lines to protect constitutional values in other contexts. For example, in the first amendment context, the federal courts searched for "qualitative formula[e], hard, difficult to evade" in defense of expressive liberty. Letter from Learned Hand to Zechariah Chafee, Jr., (Jan. 2, 1921), reprinted in Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 Stan. L. Rev. 719, 769 app. (1975). See also, e.g., *Ballew v. Georgia*, 435 U.S. 223 (1978) (line drawn between five-person and six-person juries for purposes of unanimity requirement); *Baldwin v. New York*, 399 U.S. 66 (1970) (line drawn between imprisonment for more than six months and imprisonment for less than six months in determining right to jury trial); *Bloom v. Illinois*, 391 U.S. 194 (1968) (drawing line between criminal contempts which must be tried to jury and those when need not be so tried, based on states' line drawing for similarly punished crimes).

rant certification of a juvenile to stand trial as an adult and that a State "should [not] be required to show that a killer is emotionally mature, because probably he is not going to be." Transcript of Oral Argument, *Eddings v. Oklahoma*, *supra*, at 41. Rather, Oklahoma argues, the horrifying nature of a crime is enough to justify a death sentence imposed on any adolescent who knew the difference between right and wrong. Brief of Respondent Oklahoma at 65-67. Oklahoma's insistence that some brutal crimes can only be punished by death, *id.* at 67, belies the State's plea that it now wants the freedom to administer a system "sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. at 110.

It is undeniably true, as the Respondent contends, "that this class of [young murderers is] capable of committing horrifying crimes." Brief of Respondent Oklahoma at 65. Without any question, "young murderers are capable of acts of incredible viciousness and cruelty." *Id.* at 66.

Yet, despite these truths, it must be denied—again and again—that these facts amount to a complete and adequate justification for the death penalty in any particular case or class of cases. The brutality of a crime—even extreme brutality—is not a sufficient index to moral guilt. The horrible character of all-too-many murders obscures the reality that those "who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, ___ U.S. ___, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). This Court requires that juries or other sentencing authorities must give attention not only to the manner of the crime, but also to the responsibility of the criminal. See, e.g., *Sumner v. Shuman*, ___ U.S. ___, 107 S.Ct. 2716, 2722-23 & n.5 (1987). When analysis does focus on the moral responsibility of adolescents—even

those guilty of the most brutal crimes—the retributive justice of a death sentence against a child or adolescent is almost impossible to see.

Adolescents who commit murder typically suffer from a variety of serious disturbances which inhibit their natural growth and development. [T]hese disturbances, acting in combination, exacerbate the already existing vulnerabilities of youth and place an adolescent at extreme risk for seriously violent behavior.

Brief of American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as Amicus Curiae at 9. Careful study of those young men and women condemned to death while still children or adolescents reveals the tragic patterns that led to their individual fates. These tragic factors tend to lessen moral guilt. These condemned human beings are not innocents, but before the brutal nature of their crimes is used to obscure their humanity, this Court must remember that they are also victims: They are victims of chaotic family backgrounds; they have suffered extreme physical and sexual abuse; they have been witnesses to or victims of “sustained, repetitive” and extraordinarily brutal intrafamily violence; some suffered express or implicit family pressure to kill; often they were afflicted with severe cognitive limitations, physiological damage increasing impulsivity and volatility, and psychiatric disorders. *Id.* Under such circumstances, despite Oklahoma’s arguments to the contrary, state judicial systems are not justified in believing that the brutality of the crimes “are themselves so grievous . . . that the only adequate response may be the penalty of death.” Brief of Respondent Oklahoma at 67, quoting *Gregg v. Georgia*, 428 U.S. at 184.

Even when horrifying brutal crimes are the focus for inquiry, Respondent Oklahoma assumes a burden of proof

it cannot carry. While it is true that Petitioner cannot rely on clear-cut precedents to justify a minimum chronological age, Oklahoma cannot rely on any precedent to argue—as it does—that in this undefined class of particularly brutal murders, youth, chronological age and emotional immaturity are of no special relevance to the fundamental questions of moral guilt, personal responsibility and retributive justice.⁸ As Justice Powell wrote:

Where a capital defendant’s chronological immaturity is compounded by “serious emotional problems, . . . a neglectful, sometimes even violent, family background, . . . [and] mental and emotional development . . . at a level several years below his chronological age,” . . . the relevance of this information to the defendant’s culpability and thus to the sentencing body, is particularly acute. *The Constitution requires that a capital sentencing system reflect this difference in criminal responsibility between children and adults.*

Burger v. Kemp, 107 S.Ct. at 3140 (Powell, J., dissenting).

Yet, in some cases, the brutal nature of the crime—or perhaps the inflammatory nature of the evidence—will

⁸ Oklahoma cites *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir. 1983), cert. denied sub. nom. *Rumbaugh v. McCotter*, 473 U.S. 919 (1985) for the proposition that “a seventeen-year-old person . . . did not lack the requisite mental competence to waive his right to further judicial review of his [death] sentence.” The State infers from *Rumbaugh* that “[i]f a young person can be found to be able . . . to choose to stop further appeals of his death sentence . . . , certainly a state judicial system should be able to find that certain juveniles should . . . receive the death sentence . . .” Brief of Respondent Oklahoma at 43-44.

Oklahoma misstates the *Rumbaugh* decision. The condemned man, Rumbaugh, was approximately twenty-five years old at the time he waived further appeals rights, although he had been seventeen years and ten months old at the time of his crime. V. Streib, *Death Penalty for Juveniles* 121-25 (1987).

often be enough to prevent "a reasoned moral response to the defendant's background, character and crime," *Sumner v. Shuman*, 107 S.Ct. at 2723 n.5; *California v. Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring). In such tragic cases, "mere sympathy or emotion," *id.*, will all too frequently govern the outcome of the sentencing proceeding. When the facts respecting moral guilt of condemned children and adolescents are collected, as they have been by Amici American Society for Adolescent Psychiatry and American Orthopsychiatric Association, there is good reason to condemn the sensitivity, the objectivity, the fairness and the justice of a case-by-case assessment of youth as a mitigating circumstance—particularly when the crimes are the most horrifying. When a murder is particularly brutal, the reality is that the undeniable tradition of more careful, more sensitive consideration of youthful offenders⁹ cannot be vindicated except by means

⁹ The Brief Amici Curiae of Kentucky et. al. argues that the Petitioner's statistics do not sustain the contention that state criminal courts are reluctant to condemn the young to death.

It is true that Petitioner's statistics are not refined in some of the respects identified by Respondent's Amici. However, they are completely adequate to verify the reluctance of the criminal system to impose death sentences on the young. Many of the factors that were not measured in petitioner's statistics still reflect the criminal justice system's reluctance to impose death sentences on children and adolescents: If an adolescent murderer escapes a death sentence because state courts refused to waive juvenile jurisdiction or because the prosecutor never requested a capital sentence or because a prosecutor accepted a plea bargain or even because a state refuses to inflict a penalty of death on anyone, the important point is that the adolescent murderer was not sentenced to die. Thus, Amici cannot deny the reality that criminal justice systems only rarely condemn the young to death.

Kentucky's Amici Brief provides no numbers at all to refute the statistics of petitioner. Indeed, when Kentucky asserts the existence of a contrary trend—that there is an increasing trend towards more juvenile executions—it provides no data whatever.

of a minimum chronological age.¹⁰

II. THE RELIABILITY OF THE DEATH SENTENCING PROCESS WAS UNDERMINED BY THE ADMISSION OF PREJUDICIAL, INFLAMMATORY PHOTOGRAPHS.

The Respondent failed to notify this Court of *Jones v. State*, 738 P.2d 525 (Okla. Cr. 1987), a case involving the same murder that led to Petitioner's death sentence.¹¹ In *Jones*, the Oklahoma Court of Criminal Appeals overturned the conviction and death sentence of one of the Petitioner's adult co-defendants. The appellate court also reaffirmed its strong condemnation of the trial court's

¹⁰ The Amici Curiae Brief of Kentucky et. al. condemns the rigidity of any "bright line" chronological age limit on the States' ability to condemn adolescents to death. However, there is not even a consensus on this point among the nineteen states signing the Amici brief.

(1) Only one of the nineteen states joining the brief currently has anyone under a sentence of death for a crime committed at age fifteen or younger. That one state, North Carolina, recently amended its death penalty statute to prohibit the death penalty for crimes committed by individuals under age seventeen (with minor exceptions). See Appendix A.

(2) Two other states joining the Amici Brief (Connecticut and New Mexico) have minimum ages of eighteen in their statutes.

(3) The primary author of the Amici Brief, the state of Kentucky, has recently enacted a minimum age of sixteen.

(4) The state of Kansas has no death penalty at all.

Thus, it is plain that the personal opinions of the Attorney General for these five states are not shared by the legislatures of their states or by the people of their States.

¹¹ The opinion was decided on May 22, 1987. It was not published until the June 6, 1987 issue of the Oklahoma Bar Journal, 58 O.B.J. 1592, after filing of the Petitioner's Brief, but two months before Respondent's Brief was filed.

admission of gruesome color photographs depicting the victim's decomposing remains.

Despite the clear findings of the Court of Criminal Appeals in the opinion below in the case at bar and in its opinion in *Jones*, the State insists that the color photographs of the victim's decomposing body had probative value and were not inflammatory so that their admission at trial did not render the trial fundamentally unfair. Brief of Respondent Oklahoma at 90-91, 94-95. In reality, the State asks this Court to substitute its own judgment on state evidentiary questions for the judgment of the Court of Criminal Appeals, which reaffirmed its judgment in *Jones*.

A trial court abuses its discretion when it admits gruesome photographs, and the probative value of such photographs is substantially outweighed by potential prejudice to the accused.

Our examination of these two color photographs leads us to conclude that their minimal probative force, in light of their cumulative nature, was substantially outweighed by the danger of unfair prejudice The two photographs depicted the body of Keene, which had been submerged for nearly a month, and was obviously in a state of decomposition. In State's Exhibit 10, the body is shown covered with algae and slime, a factor which added to its gruesomeness, and lessened its probative value as the algae partially covered the wounds. State's Exhibit No. 11, which also revealed Keene's algae covered body, depicted the body in an advanced state of decomposition as evidenced by the condition of the skin and hair, portions of which were missing. These two photographs added virtually nothing to the State's submission of proof, and served no other purpose than to inflame the jury. See *Thompson v. State*, 724 P.2d 780, 782 (Okla. Cr. 1986).

738 P.2d 528 (citations omitted.)¹²

In light of the appellate court's discussion of the photographs' admission in *Thompson* and *Jones*, the constitutional issue in the instant case is clarified. Petitioner need not—and does not—ask this Court to begin the difficult task of establishing constitutional standards for deciding what evidence is too gruesome and what evidence is not. When state courts find that inflammatory evidence has been erroneously admitted, state courts are obligated to recognize and remedy not only prejudice to guilt-innocence deliberations, but also the prejudice to an accused's federal rights to a fair and reliable death sentencing procedure. Thus, the mistakes of the trial court may have related to state evidentiary problems initially, but they proved to be fundamental and constitutional in their effect in this case.

Oklahoma insists that the erroneous introduction of the photographs is harmless, because "evidence in this case was strong." Brief of Respondent Oklahoma at 94 (quoting *Thompson v. State*, 724 P.2d 780, 783 (Okla. Crim. App. 1986)).

Unlike the argument of Respondent's Brief before this Court, the Court of Criminal Appeals was focusing on whether the photographs affected deliberations over guilt and innocence. Respondent's Brief now asserts that the inflammatory photos did not prejudice the jury's determination that the murder was "especially heinous, atro-

¹² The Court also found that the trial prosecutor in the *Jones* and *Thompson* cases, who appeared personally before the Court of Criminal Appeals to argue *Jones*, engaged in various forms of serious and prejudicial prosecutorial misconduct. *Jones*, 738 P.2d at 528-531. "[A] prosecutor is strictly prohibited from using arguments calculated to inflame the passions and prejudices of the jury." *Id.* at 529.

cious, or cruel"—although the Oklahoma Court of Criminal Appeals did not consider this point.

In other words, Oklahoma offers a new analysis that was not offered by the Court of Appeals: Because there is substantial evidence of serious physical abuse, the existence of a statutory aggravating circumstance is clear and the boy could be sentenced to death.

Respondent's analysis misses a step. Even assuming that the jury would have found an aggravating circumstance without the photographs,¹³ the jury is also

¹³ Even this assumption is mistaken.

The boy's eligibility for a death sentence is supported by only one aggravating circumstance—that the murder was "especially heinous, atrocious or cruel." The jury's reactions to the crime, not to the boy, are the only articulated basis of the sentence.

The introduction of these inflammatory photographs calculated to inflame the jury, *Thompson v. State*, 724 P.2d at 782, along with the prosecutor's repeated, improper use of those photographs, injected powerfully emotional but legally irrelevant considerations into the jury's deliberations over the character of the killing. By riveting the jury's attention on the effects of the crime—the decomposing remains—the prosecutor distracted the jury from its real function of deciding whether the manner of this particular crime was "especially heinous, atrocious or cruel." The jury's physical and emotional revulsion at the spectacle of decomposing remains may have led the jury to apply the statutory standard improperly. Cf. *Godfrey v. Georgia*, 446 U.S. 420 (1980) (jury's deliberations must be channeled by clear and objective standards); *Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1987) (Oklahoma's use of "especially heinous, atrocious or cruel" aggravating standard is unconstitutionally overbroad, because objective standards to guide jury did not exist).

In short, Respondent's theories notwithstanding, if the photographs had not been misused, the jury might have decided that the killing was not so "especially heinous, atrocious or cruel" as to establish this aggravating circumstance beyond reasonable doubt. Even if a finding of this aggravating circumstance was theoretically possible, it was not logically inevitable or legally mandatory—in light of all circumstances.

required by Oklahoma's death penalty statutes to weigh the aggravating circumstances against the mitigating circumstances. 21 Okla.Stat. §§ 701.10, 701.11. *Cartwright v. Maynard*, 822 F.2d 1477, 1480 (10th Cir. 1987) (in Oklahoma, "the sentencer must balance all . . . statutory aggravating circumstances with all . . . mitigating circumstances.")

Oklahoma's analysis fails to come to grips with the fact that the inflammatory evidence could—and probably did—affect the jury's weighting of the single aggravating circumstance and all mitigating circumstances. The prosecutor deliberately used these inflammatory photographs to alter the jury's "balancing" of the aggravating and mitigating factors. Despite defense counsel's objections, the trial court allowed the prosecutor's inflammatory tactics, except for a mild warning not to wave the photographs in front of the jury. Under these circumstances, the emotional impact of the photographs on the jury's "balancing" and on its ultimate decision must be presumed.¹⁴

¹⁴ Respondent tries to minimize the impact of the photographs on the sentencing process by citing the jury's refusal to find that the boy would probably commit violent criminal acts again. Respondent claims that this aspect of the jury's verdict shows that it was not acting "irresponsibly." Brief of Respondent Oklahoma at 95.

The prosecutor introduced the photographs because he wanted the jurors to confront the spectacle of decomposing remains. The prosecutor wanted the jury to be revolted at the sight of the photographs. And he wanted that revulsion to drive the jury toward one, and perhaps two aggravating circumstances and a death sentence. That he was only partially successful—the jury cited only one aggravating circumstance and returned a death sentence—does not negate the presence of unconstitutional emotion and prejudice.

Indeed, the split verdict on the prosecution's bill of particulars suggests that the inflammatory photographs had great impact when the jury placed such overriding significance on the presence of the single aggravating circumstance in its final decision to impose a sentence of death.

This Court cannot affirm the death sentence in this case without turning its back on established principle that “the sentence imposed . . . should reflect a reasoned, moral response to the defendant’s background, character and crime rather than mere sympathy or emotion.” *California v. Brown*, 107 S.Ct. at 841 (O’Connor, J., concurring). See also, e.g., *Sumner v. Shuman*, 107 S.Ct. 2723 n.5; *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (Any death sentence must “be, and appear to be, based on reason rather than caprice or emotion.”); *Booth v. Maryland*, ___ U.S. ___, 107 S.Ct. 2529, 2536 (1987) (same); *Zant v. Stephens*, 462 U.S. at 885 (same). The photographs—and the prosecutors’ use of the photographs—posed a clearer, more serious process than the victim impact statements which the Court found to be unconstitutionally admitted for jury consideration in *Booth v. Maryland*. Oklahoma’s attempt to put a boy to death for a crime committed while he was still a child of fifteen years makes the following principles all the more pertinent:

[A] jury must make an “individualized determination” of whether the defendant in question should be executed, based on “the character of the individual and the circumstances of the crime.” . . . [E]vidence [considered during sentencing must have] some bearing on the defendant’s “personal responsibility and moral guilt.” To do otherwise would create the risk that a death sentence will be based on considerations that are “constitutionally impermissible or totally irrelevant to the sentencing process.”

107 S.Ct. at 2533.

Moreover, these victim impact photographs were more serious violations of the accused’s right to a fair sentencing proceeding than Maryland’s victim impact statements in *Booth* for reasons suggested by Justice White and Justice Scalia, dissenting. Justice White emphasized that Maryland’s legislature made a specific judgment “the jury

should have the testimony of the victim’s family in order to assist it in weighing the degree of harm that the defendant has caused and the corresponding degree of punishment that should be inflicted.” This legislative decision, Justice White argued, “was entitled to particular deference.” 107 S.Ct. at 2539. In this case, by contrast, Oklahoma’s legislative and judicial judgments clearly indicate that the jury should *not* have had the inflammatory photographs of decomposing remains before them. Respondent cannot argue that this Court should defer to Oklahoma’s judgments about sentencing process, because Oklahoma’s procedural and evidence law was violated, as held by the Court of Criminal Appeals.

Moreover, Respondent Oklahoma does not and cannot claim that jury examination of these photographs was pertinent to the jury’s duty to assess the boy’s “personal responsibility.” 107 S.Ct. 2542 (Scalia, J., dissenting). The emotional and physical reaction to viewing decomposing remains cannot be reasonably compared to Maryland’s deliberate effort “to lay before the sentencing authority the full reality of human suffering” caused by a murder. *Id.*

The Oklahoma Court of Criminal Appeals has already found that the photographs “added virtually nothing to the State’s submission of proof,” *Jones, supra*, 738 P.2d at 528, and that “[a]dmitting them into evidence served no purpose other than to inflame the jury.” *Thompson v. State*, 724 P.2d at 782. Thus, it is hard to imagine how Oklahoma can now evade the lessons of *Booth v. Maryland*. By deliberately riveting the jury’s attention on a decomposing body, the prosecutor—aided by the decisions of the trial court—created an “intolerable danger,” *Caldwell v. Mississippi*, ___ U.S. ___, 105 S.Ct. 2633, 2641 (1985), that the jury would be “distract[ed] from its constitutionally required task—determining whether the

death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." *Booth*, 107 S.Ct. at 2535.

CONCLUSION

Petitioner respectfully requests that this Court reverse the judgment of the Oklahoma Court of Criminal Appeals insofar as it affirmed the death sentence in this case, vacate the death sentence and grant such other relief as it deems appropriate.

Respectfully submitted,

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APPENDIX

APPENDIX A

States Establishing A Minimum Age For Death Sentences By Express Statutes

Age 18:	Age 17:	Age 16:
California	Georgia	Kentucky (1986) ²
Colorado (1985)	New Hampshire	Nevada
Connecticut	North Carolina (1987) ¹	
Illinois	Texas	
Maryland (1987)		
Nebraska (1982)		
New Jersey (1986)		
New Mexico		
Ohio (1981)		
Oregon (1985)		
Tennessee (1984)		

Dates of statutory enactment noted for all states establishing minimum limits since 1981.

Statute citations were compiled in Appendix B of the Brief of Petitioner previously filed in this case. The notes correct and update Appendix B of the Brief of Petitioner.

¹ North Carolina amended its statutes to establish a minimum age for the death penalty, except for prisoners who kill after a prior conviction for murder. N.C. Gen. Stat. §14-17 (House Bill 541, July 29, 1987).

² Ky. Rev. Stat. Ann. §640.040 (1986).

APPENDIX B

**States With An Implied Minimum Age For Death Sentences
Based On An Express Minimum Age For Adult Court
Jurisdiction**

Age 16:	Age 15:	Age 14:
Indiana (1987) ¹	Louisiana	Alabama
	Virginia	Arkansas
		Idaho
		Missouri
		Utah
Age 13:	Age 12:	
Mississippi	Montana	

Statute citations were compiled in Appendix B of the Brief of Petitioner previously filed in this case. The notes correct and update Appendix B of the Brief of Petitioner.

NOTE: Since the death penalty cannot be imposed by juvenile courts, a statute with an express minimum age for adult court jurisdiction has the effect of setting a minimum chronological age for capital punishment. It is clear from the legislative history of many of these statutes that the effect on the death penalty was not explicitly considered when these statutes were enacted. V. Streib, *Death Penalty for Juveniles* 43-45 (1987). As noted, Indiana is an exception to this generalization.

¹ Ind. Code Ann. §31-6-2-4 (H.B. 1022 1987) (minimum age sixteen for general criminal court jurisdiction, but legislative debate centered on the proper minimum age for imposing death sentences).

(8)
No. 86-6169

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,

Petitioner,

—vs.—

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

**BRIEF OF THE OFFICE OF THE STATE APPELLATE
DEFENDER OF ILLINOIS AS AMICUS CURIAE**

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QUESTION PRESENTED

1. Whether evolving public standards of decency and fundamental fairness require the prohibition of the application of the death penalty in cases where the defendant was a juvenile at the time of commission of the offense, pursuant to the eighth and fourteenth amendments?
2. Whether the prohibition of the application of the death penalty should extend to all persons under eighteen years of age at the time of commission of the offense?

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IN THE
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Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals
Of The State Of Oklahoma

Brief Of The Office Of The State
Appellate Defender Of Illinois
As Amicus Curiae

INTEREST OF AMICUS CURIAE

Theodore Gottfried is the State Appellate Defender for Illinois. For the past fifteen years, the Office of the State Appellate Defender has been appointed by the circuit courts to

represent indigent criminal defendants on appeal in Illinois. Ill.Rev.Stat., 1972, Ch. 38, Sec. 208-1. Currently, the Office of the State Appellate Defender handles the majority of indigent criminal appeals throughout the State of Illinois. Additionally, the Office of the State Appellate Defender is appointed to represent indigent criminal defendants who are sentenced to death on their automatic appeal in the Illinois Supreme Court. Of the more than 100 cases currently on appeal from sentences of death, the Office of the State Appellate Defender represents over half of the appellants.

Currently, the minimum age for which the death penalty can be imposed in Illinois is eighteen. Ill.Rev.Stat., 1982, Ch. 38, Sec. 9-1(b). If the defendant was younger than eighteen at the time of commission of the offense,

the death penalty cannot be imposed under current law in Illinois.

At issue before this Court in Thompson v Oklahoma, is whether the United States Constitution precludes imposition of the death penalty for juveniles. In the event this Court holds that it is constitutional to impose the death penalty on a juvenile, then it is likely that the Illinois Legislature will consider lowering the age of jurisdiction for the death penalty in Illinois. One newspaper article recently included a quotation from a state representative in Illinois advocating lowering the age of jurisdiction to include 15, 16, and 17 year olds in the penalty of the death sentence. THE HAMMOND TIMES, "Teens Escape Death Row", Jan. 25, 1987, page 1. In the event Illinois lowers the age of jurisdiction of the death penalty, the Office of the State Appellate Defender

will be responsible for representing any juveniles sentenced pursuant to the lowered age requirement.

Thus, amicus is familiar with issues arising from the representation of persons sentenced to the death penalty, and is concerned that the application of the death penalty not be extended to include juveniles. Moreover, amicus believes that the history of the death penalty in Illinois reflects an emerging public consensus that eighteen is the appropriate dividing line for purposes of application of the death penalty. For these reasons, amicus urges this Court to hold that the United States Constitution precludes the imposition of the death penalty in the case of a defendant who was under eighteen years of age at the time of commission of the offense.

SUMMARY OF ARGUMENT

The eighth amendment was intended to be flexible in its interpretation of what constitutes a cruel and unusual punishment in order to expand to reflect changing public values. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The history of the development of a separate court system for juveniles reflects society's evolving recognition that juveniles are different from adults and need special protections due to their youth and immaturity. Thus, the public values regarding youth in this country have changed over the years, and legal protections have expanded in order to reflect these changes.

This concern for the protection of adolescents has been reflected in the laws authorizing a death penalty in states which have recently reviewed the requirements for the imposition of this

most extreme of all sanctions. Fourteen state legislatures, including Illinois, have debated the issue of whether juveniles should be executed and have concluded they should not be subject to the death penalty. Further, ten of these states have chosen the age of eighteen as the dividing line.

Therefore, society has gradually developed a moral abhorrence of the application of the death penalty to juveniles, and has indicated its selection of age eighteen as the most logical dividing line. In reflecting these changing social values, the eighth amendment must therefore be found to prohibit the execution of juveniles under eighteen at the time of commission of an offense.

ARGUMENT

EVOLVING PUBLIC STANDARDS OF DECENCY
AND FUNDAMENTAL FAIRNESS CLARIFY THAT

THE EIGHTH AND FOURTEENTH AMENDMENTS
PROHIBIT THE APPLICATION OF THE DEATH
PENALTY IN CASES WHERE THE DEFENDANT
WAS A JUVENILE AT THE TIME OF COMMIS-
SION OF AN OFFENSE.

Persons who were juveniles at the time of commission of an offense are precluded by their age from fully appreciating the consequences of their actions. As the most extreme sanction available, the death penalty should be imposed sparingly, being reserved for only the most serious offenders who present no foreseeable hope of rehabilitation. Illinois has concluded that juveniles, because of their youth, cannot be said to be utterly lacking in rehabilitative potential. Thus, Illinois has prohibited by statute imposition of the death penalty against any person under eighteen years of age at the time of commission of an offense. The position taken by Illinois is representative of the expanding public consensus that

juveniles, who are limited by their youth from fully comprehending the consequences of their actions, are not by definition fit candidates for imposition of the most extreme sanction available.

The eighth amendment ban on cruel and unusual punishments was designed to be flexible in order to incorporate evolving standards of decency. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). As Mr. Justice Marshall stated in his concurring opinion: "Perhaps the most important principle in analyzing 'cruel and unusual' punishment questions is one that is reiterated again and again in the prior opinions of the Court: i.e., the cruel and unusual language must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Thus, a penalty that was permissible at one time in our

Nation's history is not necessarily permissible today." 33 L.Ed.2d at 401. Evolving standards of decency in our society reveal that the public has reached a consensus that imposition of the extreme sanction of the death penalty in a case where the defendant was a juvenile at the time of commission of the offense is morally unacceptable. These evolving standards are reflected in the history of treatment of juveniles in Illinois.

Illinois has a proud tradition of evidencing concern for its juvenile population. In 1899, Illinois was the first state in the nation to adopt a juvenile court statute. In re Urbasek, 38 Ill.2d 535, 232 N.E.2d 716, 718 (1967). Other states quickly followed the lead of Illinois, creating special courts for children in every state during the period from 1899 to 1925. Whitebread

and Batey, "The Role of Waiver in the Juvenile Court: Questions of Philosophy and Function", Hall, Hamparian, Pettibone, and White, eds., Major Issues in Juvenile Justice Information and Training: Readings in Public Policy -- Youth in Adult Courts (Acad. for Contemporary Problems, 1981) at 208. These juvenile courts were established to operate informally and without legal process in order to rehabilitate "wayward" children through the use of the developing behavioral sciences of psychiatry, psychology and sociology. Id.

Eventually, dissatisfaction developed with the operation of these juvenile courts leading to the conclusion that some due process rights should apply for the protection of the minors since "There is evidence, in fact, that there may be grounds for concern that the child

receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84, 94 (1966). Thus, essential rights of due process, including notice, right to counsel, right to confrontation and the privilege against self-incrimination, were extended to juvenile delinquency proceedings in In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). The requirement that proof be beyond a reasonable doubt was also extended to juvenile proceedings. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, the philosophical rehabilitative ideal of the separate juvenile court system was left unchanged in Gault and Winship.

Subsequent decisions continued to uphold the philosophical rehabilitative ideal of the juvenile court system. In concluding that the right to a jury trial should not be extended to juveniles, this Court reviewed the relative success of this evolving separate system of justice for minors:

The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say, as do the Pennsylvania appellants here, that the system cannot accomplish its rehabilitative goals. So much depends on the availability of resources, on the interest and commitment of the public, on willingness to learn, and on understanding as to cause and effect and cure. In this field, as in so many others, one perhaps learns best by doing. We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial.

McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647, 662 (1971). Minors were viewed as different from adults in that they were both more amenable to rehabilitative treatment and, due to their youth, less criminally responsible for their actions. In reviewing the grant of the right to confrontation in Gault, this Court took note of the relative immaturity of teenagers within the criminal justice system:

Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs

counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. 18 L.Ed.2d at 556.

Thus, for nearly a century states in this country have been gradually creating a separate court system for juveniles, based on the premise that minors are different from adults and need greater protections.

This concern for the protection of adolescents is reflected in the evolution of the qualifications for the death penalty in Illinois. Of the 281 juveniles executed in this country's history, only one minor has ever been executed in Illinois for a crime committed while under age eighteen. An Examination of Executions in America: The Espy File (Mar. 18, 1986)(Paper presented at the Annual Meeting of the Academy of Criminal Justice Sciences; Orlando, Fla.)(Avail-

able from Professor John Smykla, University of Alabama.) The sole juvenile executed in Illinois was Charles Walz, who was put to death on February 20, 1929 for the offense of murder committed when he was seventeen years old. Streib, Victor; Death Penalty for Juveniles, Indiana University Press (To be published this summer (A copy can be obtained from Prof. Streib at Cleveland-Marshall College of Law, Cleveland, Ohio) The line of demarcation between adult and child was not specifically stated within the pre-Furman Illinois statute. Ill.Rev. Stat., 1973, Ch. 38, Sec. 1005-8-1A; Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.E.2d 346 (1972); People ex rel. Rice v. Cunningham, 61 Ill.2d 353, 336 N.E.2d 1 (1975). In 1982, P.A. 82-677 became effective and set forth the requirement that a person be eighteen years of age at the time of commission of

an offense in order to qualify for imposition of the death penalty.

Ill.Rev.Stat., 1982, Ch. 38, Sec. 9-1(b).

Thus, the line of demarcation in Illinois between juvenile and adult for purposes of imposing the death penalty has gradually evolved from the failure to promulgate any specific age requirement within the death penalty statute to the specific requirement of age eighteen.

This Court quoted from a Task Force Report indicating philosophical agreement with Illinois' approach of excluding minors from the death penalty in its decision in Eddings v. Oklahoma:

"Adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long range terms than adults. Moreover, youth crime as such is not exclu-

sively the offender's fault; offenses by the young also represent a failure of family, of school, and the social system, which share responsibility for the development of America's youth." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth-Crime* 7 (1978).

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, 11 (1982). In Eddings, this Court held that youth is a relevant mitigating factor since minors are less mature and responsible than adults, but failed to address the issue of whether the eighth amendment prohibits execution of juveniles. This footnote cited in Eddings clarifies that minors should be excluded from the death penalty.

The immaturity of adolescents has led a number of states to conclude, as did Illinois, that the death penalty should not apply to youth under the age of eighteen years. Of the 36 states

which presently have a death penalty statute, the legislatures of fourteen states have examined the issue of whether to apply the death penalty to minors, and 10 of those 14 states have chosen the age of eighteen as the age of execution.

Streib, "The Eighth Amendment and Capital Punishment of Juveniles", 34 Cleveland State Law Review 363 (1987). Thus, the majority of the states which have considered the issue have chosen eighteen as the most appropriate age for application of the death penalty.

Additionally, there is international agreement that eighteen is the appropriate age for execution. Three quarters of the countries which prohibit capital punishment for juveniles have chosen the age of eighteen as the dividing point.

Streib, "The Eighth Amendment and Capital Punishment of Juveniles", 34 Cleveland State Law Review 363 (1987). As Streib,

points out, "More than three-fourths of the nations of the world (seventh-three of the ninety-three reporting countries) have set age eighteen as the minimum age for capital punishment." Id., 389.

Finally, the American Bar Association recommends selection of the age of eighteen as the dividing point since eighteen is the most common age for the granting of adult privileges, such as voting and drinking. "ABA Opposes Capital Punishment for Persons Under 18", 69 A.B.A.J. 1925 (1983).

It is obvious, therefore, that the emerging national and international consensus is that the sanction of the death penalty should not apply to juveniles. Further, there is widespread agreement that eighteen is the appropriate age to select as the dividing point for purposes of availability of the death penalty. In light of this overwhelming

indication of public abhorrance at the execution of juveniles, the Eighth Amendment clearly prohibits the use of the death penalty for minors.

CONCLUSION

The state legislatures of this country have taken great strides in recognizing the special needs of juveniles and in protecting youths from extreme sanctions such as the death penalty. This evolving concern that juveniles not be executed reflects the changing moral values of our society. The eighth amendment was designed to reflect changing social values in its interpretation of what constitutes a cruel and unusual punishment. Thus, amicus urges this Court to hold that the eighth amendment recognizes these changing social values and thereby prohibits the execution of juveniles

under eighteen years of age at the time of commission of an offense.

Respectfully submitted,

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BRIEF OF AMNESTY INTERNATIONAL

INTEREST OF AMICUS CURIAE

This brief is submitted amicus curiae by Amnesty International ("AI"), with the consent of the parties.¹

Amnesty International is an independent international human rights organization which (1) seeks the release of "prisoners of conscience" -- men and women detained anywhere because of their beliefs, colour, sex, ethnic origin, language or religious creed, provided they have not used or advocated violence; (2) works for fair and prompt trials for all political prisoners and on behalf of such people detained without charge or trial; and (3) opposes the

¹ The parties' letters of consent to the filing of this brief are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

death penalty and torture or other cruel inhuman or degrading treatment or punishment of all prisoners without reservation. AI acts on the basis of the Universal Declaration of Human Rights and other international instruments. Amnesty International opposes the death penalty unconditionally, believing it to be the ultimate cruel, inhuman and degrading punishment and a violation of the right to life, as proclaimed in the Universal Declaration and other international human rights instruments.

Amnesty International was founded in London in 1961 and now has sections in forty-four countries (in Africa, Asia, the Americas, Europe and the Middle East), including the United States, with individual members, subscribers and supporters in more than 120 other countries. There are 3,341 local

AI groups throughout the world working in support of all aspects of AI's mandate. Since Amnesty International was founded AI groups have intervened on behalf of more than 25,000 prisoners in over a hundred countries with widely differing ideologies. In 1977, AI received the Nobel Prize for its work.

Amnesty International has formal consultative status, or similar formal relations, with the United Nations, UNESCO, the Organization of American States, the Council of Europe and the Organization of African Unity.

In February 1987, AI initiated a worldwide campaign urging states within the United States which retain the death penalty to abolish it. The campaign is based upon a 240 page report which discusses all aspects of the death penalty as implemented in the United

States, including the execution of juvenile offenders. United States of America: The Death Penalty, at 65-75 (February 1987).

Amnesty International does not approve of and would not defend any violent crime. AI cannot regard the death penalty -- particularly as applied to crimes committed by juvenile offenders -- other than as cruel, inhuman and degrading treatment and incompatible with respect for the inherent dignity of the human person.²

With respect to the execution of

² Trop v. Dulles, 336 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.")

juvenile offenders,³ there exists a well developed, unequivocal international legal and moral consensus prohibiting all nations from executing children for their crimes. However heinous the crime, the imposition on a young person of a sentence of utmost cruelty, which denies the possibility of rehabilitation or reform, is contrary to contemporary standards of justice and humane treatment.

³ The term "juvenile," "child" or "juvenile offender" as used in this brief refers to a person who was under 18 at the time they committed their crime in accordance with the internationally recognized legal standards described in this brief.

SUMMARY OF ARGUMENT

In the past decade only a handful of juvenile offenders have been executed by governments in the world. Since 1979 out of the thousands of executions recorded by Amnesty International, only eight were reported to have been executions of juvenile offenders. These executions occurred only in Rwanda, Pakistan (two), Bangladesh, Barbados and the United States (three). There have also been unconfirmed reports of executions of juvenile offenders in Iran in recent years. These "unusual" events stand against a nearly universal consensus of the international community that the execution of juvenile offenders is not only offensive to contemporary international norms of moral decency but also violates internationally recognized legal standards.

Amnesty International, based on its knowledge of national practices regarding the execution of juvenile offenders and its participation since 1961 as an observer in the development of international legal standards in this area, believes that there is a well established internationally recognized legal standard prohibiting the execution of juvenile offenders. In this brief AI describes the international documents, including widely ratified multilateral treaties, and practices of nations which demonstrate the existence of this international prohibition.

The evidence of international consensus on this issue is overwhelming. Virtually every nation in the world, including the United States, has ratified treaties which prohibit the execution of juvenile offenders in some

circumstances (e.g., during wartime). The majority of nations have ratified treaties which prohibit the execution of juvenile offenders in all circumstances. Moreover, there have been numerous additional international expressions of the prohibition against the execution of juvenile offenders in the work of various international bodies. The United States has been a participant in these developments and, until recently at least, has never objected to the development of the internationally recognized legal standards prohibiting the execution of juvenile offenders.

This body of internationally recognized legal standards and opinion should be considered by this Court in determining whether the execution of appellant William Wayne Thompson for a crime committed when he was fifteen

years of age would violate the Eighth Amendment's prohibition against cruel and unusual punishment. The international community has achieved a consensus on this question which is relevant to this Court's Eighth Amendment analysis under Trop v. Dulles, 356 U.S. 86, 101 (1958), and its progeny. In fact, on the question of the execution of juvenile offenders the evidence of international consensus is more compelling than the evidence upon which the Court relied in Trop or in the death penalty cases which have applied the analysis in Trop. See, e.g., Gregg v. Georgia, 428 U.S. 153, 173 (1976) (Stewart, J., plurality opinion); Enmund v. Florida, 458 U.S. 782, 796 n. 22 (1982).

The fact that the execution of juvenile offenders conflicts with internationally recognized legal standards

should be given particular weight in this Court's constitutional analysis. Constitutional guarantees under the United States Constitution should not provide significantly less protection than the protection afforded by international norms on important issues of human rights and fundamental freedoms. Amnesty International urges this Court to recognize the significance of the position taken by the international community on this issue by preventing the execution of William Wayne Thompson under the Eighth Amendment of the United States Constitution.

ARGUMENT

I.

INTERNATIONALLY RECOGNIZED LEGAL STANDARDS AND NATIONAL PRACTICES SUPPLY COMPELLING EVIDENCE THAT THE EXECUTION OF JUVENILE OFFENDERS CONSTITUTES CONSTITUTIONALLY PROSCRIBED CRUEL AND UNUSUAL PUNISHMENT

- A. This Court has Looked to Internationally Recognized Legal Standards and the Practices of Other Nations to Determine the Meaning of "Cruel and Unusual Punishment" Under the Eighth Amendment

As this Court recognized in 1910, the Eighth Amendment prohibition against cruel and unusual punishment "is not fastened to the obsolete." Weems v. U.S., 217 U.S. 349, 378 (1910). A half-century later, this Court again emphasized that the Eighth Amendment "must derive its meaning from evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

As befits a nation mindful of its place within the international community, the plurality opinion in Trop did not rely solely upon American society as its benchmark for determining "evolving standards of decency" for this purpose. In Trop, the fact that the overwhelming majority of nations did not employ denaturalization as a punishment for desertion was a significant factor in this Court's decision. Trop, supra, 356 U.S. at 102-03.

International standards are now an established aspect of Eighth Amendment analysis,⁴ particularly regarding limits for the use of executions as a

⁴ See also, Lareau v. Manson, 507 F.Supp. 1177 (D.Conn. 1980), modified on different grounds, 651 F.2d 96 (2d Cir. 1981); Sterling v. Cupp, 20 Or. 611, 625 P.2d 123 (1981), for the application of this principle in a different context.

penalty. In Coker v. Georgia, 433 U.S. 584, 596 n. 10 (1977), for instance, this Court noted that as of 1965 only three major nations in the world retained the death penalty for rape. That international perspective informed the Coker decision that the imposition of the death penalty for the rape of an adult woman is "cruel and unusual" within the meaning of the Eighth Amendment. Id.

More recently, in Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982), this Court again turned toward the "climate of international opinion" as one basis for the determination that imposition of a death sentence upon a defendant who had not intended to kill is cruel and unusual punishment. Id. In Enmund this Court looked particularly to the practices of countries in Europe and of

countries currently or formerly in the British Commonwealth. Id.

The force of international practice and opinion is even stronger against executions for crimes committed by juvenile offenders than it was for rapes (in Coker) or for unintended killings (in Enmund). In fact, the laws and practices of other nations as well as numerous international treaties, declarations and resolutions, indicate that evolving standards of decency of a maturing international community prohibit the execution of juvenile offenders.

When this Court recognized nearly 30 years ago in Trop that the United States Constitution -- and in particular the Eighth Amendment -- cannot be interpreted in isolation from international legal standards and practices, the movement

toward an international system for the protection of international human rights was in its early stages. The international perspective recognized in Trop v. Dulles has evolved through international action in later years into international human rights and legal standards recognized throughout the world.

International human rights law has now become an established, essential and universally accepted part of the life of the international community. L. Henkin, Introduction, in "The International Bill of Rights," at 1 (1981). Individuals, including people of the United States, are now understood to possess remediable rights based on international law. See, e.g., Filartiga v. Pena-Irala, 630 F.2d

876 (2d Cir. 1980)⁵ Moreover, the United States has played an important role in fostering these developments over the years.⁶ In particular, the United States participated, without protest, in the development over the past forty years of an international norm prohibiting the execution of juvenile offenders. See generally, Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death

⁵ See generally, Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555 (1984); Restatement (Revised) Foreign Relations Law of the United States, §§131(3) and (4).

⁶ In the past 15 years Congress has incorporated international human rights standards in dozens of laws. This legislation is collected in Human Rights Documents: Compilation of Documents Pertaining to Human Rights, Committee on Foreign Affairs (September 1983), at 24-58.

Penalty, 52 U. Cinn. L. Rev. 655, 682-686 (1983).

The massive evidence of laws and practice throughout the world prohibiting executions for crimes committed by juvenile offenders and the treaties condemning such executions are relevant to interpret the Eighth Amendment of the United States Constitution. The global outcry against executions for crimes committed by juvenile offenders has risen to the strength of an internationally recognized prohibition which should be respected by the United States and all other countries in the world.

B. Internationally Recognized Legal Standards and National Practices Condemn the Punishment of Death for Crimes of Juvenile Offenders

In this section Amnesty International presents the evidence that internationally recognized legal standards prohibit execution of juvenile offenders. Evidence of such standards, even emerging standards, is precisely the type of evidence entitled to persuasive weight under Trop, Coker and Enmund. This Court should give great weight in its Eighth Amendment analysis to the overwhelming consensus of international standards and practices on this issue.

1. National Laws and Practices

Over 80 nations, including almost all Western European countries, either have abolished the death penalty for all offenses, or have forbidden it for ordinary criminal offenses, or have excluded

it for certain offenders, including juvenile offenders.⁷ Significantly, these nations range widely in political, regional and cultural diversity.

Thirty countries have completely abolished the death penalty. Eighteen additional countries provide for the death penalty only for exceptional crimes, such as crimes under military law, or for crimes committed under exceptional circumstances. More than 40 of the countries which retain the death penalty for common crimes have statutory provisions recognizing juvenile offend-

⁷ A list of all retentionist and abolitionist nations is included in the Appendix at A-1 through A-7. Retentionist countries that have prohibitions against the execution of juvenile offenders in their national legislation are identified in the Appendix at A-3 through A-7.

ers as exempt from the death penalty.⁸

Even in the United States, laws in various jurisdictions which permit the use of the death penalty nonetheless recognize the uniqueness of juvenile offenders, with 27 of the 37 states with death penalty laws setting a minimum age for imposition of the death penal-

⁸ See Appendix. These statistics are taken from information in AI's files. See also, Hartman, *supra*, at 666 n. 44. A 1962 study showed that, of 117 retentionist countries, 77 countries required a minimum age of 18 for executions. Patrick, *The Status of Capital Punishment: A World Perspective*, 56 Journal of Criminal Law, Criminology and Police Science 397, 410 (1965).

ty.⁹ This practice is underscored by the declarations of various representative American legal bodies, including the American Law Institute and the American Bar Association, which have publicly opposed the execution of

⁹ Eleven states require that the minimum age be at least 18, including the recent additions of New Jersey and Maryland. These states are California, Colorado, Connecticut, Illinois, Nebraska, New Mexico, Ohio, Oregon, New Jersey, Maryland and Tennessee. Seven additional jurisdictions without a minimum age requirement expressly provide for age as one of the mitigating factors in imposing the death sentence. See also, *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982).

juvenile offenders.¹⁰

While some nations still retain the possibility of executing juvenile offenders in their laws, the actual practices of nations indicate that the execution of juvenile offenders is exceedingly rare. Although 81 nations

¹⁰ American Law Institute Model Penal Code §210.6(1)(d) (Proposed Official Draft, 1962); §210.6, Comment, 1331 Official Draft and Revised Comments (1980). The American Bar Association Report No. 117A, approved August 1983, stated:

Retribution or legal vengeance seems difficult enough for a government to justify where adult offenders are involved and vengeance against children for their misdeeds seems quite beyond justification. It has been persuasively argued that the Eighth Amendment precludes retribution for its own sake as improper. The spectacle of our society seeking legal vengeance through the execution of children should not be countenanced by the ABA.

reportedly performed executions between 1973 and 1982, only two juvenile offenders were reported to have been executed during that period.¹¹ Moreover, the Secretary General of the United Nations noted in 1973 that "[t]he great majority of Member States [of the United Nations] report never condemning to death persons under 18 years of age."¹²

Amnesty International has collected data showing that since 1979 there have been more than 11,000 judicially sanctioned executions in over 80 countries;

¹¹ Hartman, supra, note 6, at 666-67 n. 44. This data is based on the reports of more than 70 nations to the United Nations for the period in question. In addition, one non-reporting country is known to have carried out the execution of a juvenile offender in 1982.

¹² United Nations Economic and Social Council, Report of the Secretary General on Capital Punishment at 10, U.N. Doc. E/5242 (1973).

however, only eight persons who committed their offense while under the age of 18 were known to have been executed during that period. Five of these executions took place in Pakistan (two), Bangladesh, Rwanda and Barbados. The other three were Charles Rumbaugh (executed in Texas September 11, 1985, after dropping his final appeals), James Terry Roach (executed in South Carolina January 10, 1986) and Jay Pinkerton (executed in Texas May 15, 1986). There are also unconfirmed reports of executions of juvenile offenders in Iran. In the rest of the world, as in the United

States,¹³ being put to death for a crime committed as a juvenile is indeed "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

¹³ See Streib, Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed Under Age Eighteen, 36 Okla L. Rev. 613, 618-20 (1983); J. Laurence, the History of Capital Punishment 16-18 (1960); H. Bedau (ed.), The Death Penalty In America 52-56 (1964).

2. Major Human Rights Treaties Prohibit The Execution of Juvenile Offenders

The repugnance around the world towards executions for crimes committed by children has elevated this question beyond national reform into the arena of international concern and action. Numerous international treaties and other resolutions, declarations and other international documents reflect the international consensus against execution of juvenile offenders. See N. Rodley, The Treatment of Prisoners Under International Law at 186 (1987). At least three major human rights treaties explicitly prohibit the imposition of the death penalty on juvenile offend-

ers.¹⁴

¹⁴American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI 1.1, Doc. 65 Rev. 1 Con. 1 (1970) at Art. 4(5); International Covenant on Civil and Political Rights, Art. 6(5), Annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16), at 53, U.N. Doc. A/6316 (1966); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 68, 6 U.S.T. 3516, T.I.A.S. No. 3365 §75 U.N.T.S. 287.

Protocol No. 6 to the European Convention on Human Rights, ratified by seven nations and signed by all but five of the twenty-one Member States of the Council of Europe, abolishes the death penalty entirely for crimes during peacetime. Opened for signature April 23, 1983, 1983 Europ. T.S. No. 114, reprinted in 22 I.L.M. 539 (1983).

In addition, the drafting of a Convention on the Rights of the Child is currently underway. A Working Group of the U.N. Commission on Human Rights is preparing the Draft Convention. At the Working Group session in January 1986, the drafters adopted by consensus a provision which would forbid the execution, as well as a life sentence without parole, for children who commit offenses before the age of 18. The United States representative stated that the United States might make a reservation on these limitations but did not prevent the adoption of the provision by consensus. U.N. Doc E/1986/39, Para. 106.

a. International Covenant on
Civil and Political
Rights

Article 6(5) of the International Covenant on Civil and Political Rights, declares:

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall be not carried out on pregnant women.

Eighty-six nations of the world,¹⁵ including most of the Western European countries and Canada, have ratified this Covenant. Another seven nations, including the United States, have signed it.¹⁶

¹⁵ This list includes the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic.

¹⁶ The nations which have ratified or signed the Covenant are identified in the Appendix.

The debates surrounding the adoption of Article 6 of the International Covenant on Civil and Political Rights demonstrate that no opposition arose against the view that permitting executions of juvenile offenders was contrary to human rights principles.¹⁷ The travaux preparatoires reveal that the drafters of Article 6 believed that the prohibition against the execution of juvenile offenders represented a consensus of nations and never questioned the validity of this consensus.¹⁸

In fact, the travaux make clear that the Article 6(5) prohibition was no more than the codification of an

¹⁷ Hartman, supra, at 671-72.

¹⁸ Id. at 672 and n. 64, and citations noted therein.

already existing binding norm.¹⁹ The U.N. General Assembly resolution which recognized that Article 6 of the International Covenant constitutes a "minimum standard" for all Member States, not only ratifying states,²⁰ is further evidence of State practice supporting the position that the prohibition against the execution of juvenile offenders is an internationally recognized legal standard.

b. American Convention on Human Rights

Article 4(5) of the American Conven-

¹⁹ Id.

²⁰ Id. at 681 n. 94; G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980). Although the United States did not participate in the Article 6 debates, it did support this General Assembly resolution. Id. at 685, 684 n. 106, 681 n. 94.

tion on Human Rights²¹ also prohibits the execution contemplated by Oklahoma in this case:

Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to

²¹ This treaty has been ratified by nineteen American States and signed by an additional three countries, including the United States. A list of nations which have ratified or signed the American Convention is included in the Appendix.

pregnant women.²²

The drafters of the American Convention, recognizing that total abolition of the death penalty was not possible in the context of the Convention, imposed

²² On March 27, 1987, the Inter-American Commission on Human Rights of the Organization of American States held that the United States violated Article 1 (right to life) and Article 2 (prohibition of discrimination) of the American Declaration on the Rights and Duties of Man by permitting the execution of juvenile offenders. OAS IACHR Res. 3/87, Case No. 9647, (Roach and Pinkerton v. United States), OEA Ser. L/V/II 69, Doc. 17 (March 27, 1987). The Commission stated in dictum that there was a peremptory norm of international customary law prohibiting the execution of juvenile offenders. *Id.* at Para. 56. Although the Commission did not find that age 18 was the universally accepted dividing line between juvenile and adult offenders for this purpose, it did state that there was an "emerging" norm setting the age of 18 as the minimum age for the imposition of the death penalty. *Id.* at Para. 60. This decision did not address Article 4(5) of the American Convention because the United States has not yet ratified the Convention.

important limitations on the use of executions, including the prohibition of the execution of juvenile offenders.²³ Moreover, the draft proposal of Article 4(5) was patterned after the International Covenant's prohibition on the executions of juvenile offenders, thus demonstrating a belief that such a prohibition constituted the prevailing international standard.²⁴

²³ Although the motion for total abolition of the death penalty did not carry, no vote was cast against it. T. Buergenthal & R. Norris, Human Rights: The Inter-American System (1982), at 248, Booklet 12. The Rapporteur noted that the drafters acted according to the "trend in the Americas toward eliminating [capital] punishment". Report of the Rapporteur of Committee I. *Id.* at 162. A number of delegations also expressed hostility toward any use of the death penalty. See Minutes, 3d Session of Committee I, *id.* at 36-38.

²⁴ See, Hartman, *supra*, at 672-73 n. 66, and the sources cited therein.

The travaux of the American Convention indicate that the United States' delegation did not oppose per se the notion that the execution of juvenile offenders should be prohibited. Rather the United States delegation appeared more concerned that setting specific age limits on the exercise of the death penalty did not adequately take into account the "already apparent" trend toward gradual abolition of the death penalty. The U.S. stated:

The proscription of capital punishment within arbitrary age limits presents various difficulties in law, and fails to take account of the general trend, already apparent, for the gradual abolition of the death penalty... For this reason we believe the text will be stronger and more effective if this paragraph is deleted. [Emphasis added.]

Observations and Proposed Amendments to the Draft of the Inter-American

Convention on the Protection of Human Rights, T. Buergenthal and R. Norris, supra, Booklet 13, at 152.

c. Fourth Geneva Convention

The almost universally ratified Fourth Geneva Convention of 1949, concerned with the protection of civilians in time of war, also prohibits the execution of juvenile offenders in the context of war -- perhaps the most threatening period in any nation's existence. Article 68 of the Fourth Geneva Convention provides:

In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the

time of the offense.²⁵

The ratifying countries of the Geneva Convention -- 165 nations, including the United States -- virtually cover the

²⁵ The two additional Protocols to the Geneva Conventions of 1949, adopted in 1977, both rule out the death penalty for crimes committed by juvenile offenders. Geneva Protocol I Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, Article 76; Geneva Protocol II Additional to Geneva Conventions of August 12, 1949, and relating to the Protection of the Victims of Non-International Armed Conflicts, Article 6. The United States has signed both additional Protocols. In January, 1987, President Reagan announced that the United States would not ratify additional Protocol I; however, this action was taken for reasons other than the provisions of Article 76. Message From the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Noninternational Armed Conflicts concluded at Geneva on June 10, 1977, 100th Cong., 1st Sess., Treaty Doc. 100-2 (1987).

globe.²⁶ If nearly all the nations of the world, including the United States, have agreed to prohibit the execution of juvenile offenders during periods of international armed conflict, this internationally recognized standard ought to apply with even greater force during peacetime.

d. These Treaties Reflect an International Consensus Against The Execution of Juvenile Offenders

The American Convention, the International Covenant on Civil and Political Rights, and the Fourth Geneva Convention, along with their travaux preparatoires provide strong evidence

²⁶ The only nations which have not ratified the Geneva Conventions are Bhutan, Brunei, Burma, Maldives and Nauru. Kiribati has also not ratified the Conventions but they remain applicable to it by virtue of a provisional declaration of application of the treaties.

that there exists a high degree of consensus among a large number of nations that the execution of juvenile offenders is forbidden.

Under both the International Covenant on Civil and Political Rights (Article 4(2)), and the American Convention on Human Rights (Article 27(2)), the prohibitions against the execution of juvenile offenders admit of no derogation even during national emergen-

cies.²⁷ The United States Government has ratified the Geneva Conventions and has signed but not yet ratified the two

²⁷ Likewise, under Article 3 of Protocol No. 6 to the European Convention on Human Rights, no derogation from the Protocol is allowed nor may reservations in respect of the Protocol be made under its Article 4. Recently, the European Parliament passed a resolution (Doc. B 2-220/85) calling upon all Council of Europe and European Community Member States who had not yet adhered to the Protocol to do so as soon as possible. The resolution welcomed "the continuing trend towards abolition of the death penalty in Member States of the European Community" and noted that "the death penalty is a form of cruel, inhuman and degrading punishment and a violation of the right to life, even when scrupulous legal procedures are followed". Report on the abolition of the death penalty and accession to the Sixth Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1985-86 Eur.Doc. A2-167/85 at 10 (1985).

other conventions.²⁸ These treaty prohibitions provide important and authoritative evidence of the norm against the execution of juvenile offenders.

28 President Carter sent the International Covenant and American Convention, and two other treaties, to the Senate for its advice and consent on February 23, 1978. Human Rights Treaties, President's Message to the Senate, 14 Weekly Comp. Pres. Doc. 395 (Feb. 27, 1978). Although the President proposed reservations to the American Convention and the International Covenant upon their transmittal to the Senate, the Administration noted that the reservations were intended simply to avoid criticisms and implementation difficulties and "certainly not the preservation of any right to execute children or pregnant women, something never done in the United States." Response by the Department of State to the "Critique of Reservations to the International Human Rights Covenants" by the Lawyers Committee for International Human Rights, International Human Rights Treaties: Hearings before the Committee on Foreign Relations, 96th Cong., 1st Sess. 1, 55 (1979), noted in Hartman, supra, at 685 and n. 112.

3. Repeated Actions by the United Nations Condemn The Execution of Juvenile Offenders

The actions of the United Nations provide further evidence of the norm prohibiting the execution of juvenile offenders. The U.N. Economic and Social Council (ECOSOC) has adopted, pursuant to a resolution, safeguards relating to the death penalty, one of which was a prohibition against the execution of persons who committed crimes below the age of 18 years. E.C.S. Res. 1984/50, U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984). The U.N. General Assembly has endorsed these safeguards and asked the Secretary-General "to employ his best endeavours in cases where the safeguards . . . are violated." G.A. Resolution 39/118, U.N. Doc. A/39/51, at 211, Oper. paragraphs 2 and 5 (1984).

In September 1985, the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders adopted Resolution No. 15, endorsing the ECOSOC safeguards and urging all states retaining the death penalty to implement them. The U.S. joined in the consensus on this resolution. Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (26 August to 6 September 1985) U.N. Doc. A/Conf.121/22 (1985), at 86-87.

Similarly, the new U.N. Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), also adopted by the Seventh Congress and the United Nations General Assembly without dissent by the United States, provide: "Capital punishment shall not be imposed for any crime committed by

juveniles." G.A. Res 40/33, Nov. 29, 1985, Annex, rule 17.2.

CONCLUSION

"Children have a very special place in life which law should reflect." May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring), repeated in Eddings v. Oklahoma, 455 U.S. 104, 116 n. 12 (1982). As this Court emphasized in Eddings, "... youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their early years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective and

judgment' expected of adults. Even the normal 16 year old customarily lacks the maturity of an adult." Id. at 116, citing Bellotti v. Baird, 443 U.S. 622 (1979).

Violent crime is a serious problem in nearly every nation. The universal truth of Justice Frankfurter's observation in May v. Anderson, however, is equally transcendent over national boundaries. With a handful of notorious exceptions, the laws, practices, and treaties of the nations of the world reflect this truth by prohibiting the penalty of death for crimes committed by children.

These internationally recognized legal standards prohibiting the execution of juvenile offenders were developed in recognition of the fact that the death penalty - with its uniquely cruel

and irreversible character - is a particularly inappropriate penalty for individuals who have not attained full physical or emotional maturity at the time of their actions. Children and adolescents are widely recognized as being less responsible for their actions than adults, and more susceptible to rehabilitation, thus rendering the death penalty a particularly inhumane punishment in their cases. Criminologists have also noted that arguments used to support the death penalty are especially inapplicable in the case of young people. It is recognized that children and adolescents are more liable than adults to act on impulse, or under the influence or domination of others, with little thought for the long-term consequences of their actions, and they are unlikely to be deterred by the death

penalty. Many young people who commit brutal crimes themselves come from brutalized and deprived backgrounds. To impose the death penalty in such cases, whether as retribution or as an intended deterrent, violates basic principles of humanity.

The Eighth Amendment of the Constitution of the United States has been considered to offer a strong guarantee of basic human rights of the people of the United States in part because it cannot be interpreted in isolation from the human rights norms of the international community. The Eighth Amendment, like the laws, practices, and treaties of the rest of the world, should be understood as prohibiting the killing of anyone as punishment for crimes committed as a child and thus should be found to prohibit the execution of William

Wayne Thompson. By so holding, this Court will reaffirm the essential role of the United States Constitution as the governing document of a nation committed to respect for human rights. The ruling in this case will matter not simply to William Wayne Thompson, or to the other juvenile offenders already sentenced to die in the United States, or even just to the people of the United

States. In truth, the attention of the world at large will be drawn to this decision.

DATED: May 7, 1987

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APPENDIX

APPENDIX

ABOLITIONIST AND RETENTIONIST COUNTRIES (AS OF APRIL 1987)

ABOLITIONIST BY LAW FOR ALL CRIMES
(Countries whose laws do not provide for the death penalty for any crime)

	<u>ICCPR*</u>	<u>AMER CONV</u>
Australia	x	
Austria	x	
Bolivia	x	x
Cape Verde		
Colombia	x	x
Costa Rica	x	x
Denmark	x	
Dominican Republic	x	x
Ecuador	x	x
Finland	x	
Federal Republic of Germany	x	
France	x	
Haiti		x

*Countries which have ratified or acceded to the International Covenant on Civil and Political Rights or the American Convention on Human Rights are noted by an "x" and countries which have signed, but not ratified, these treaties are noted by an "s."

	<u>ICCPR</u>	<u>AMER CONV</u>
Holy See		
Honduras	s	x
Iceland	x	
Kiribati		
Luxembourg	x	
Netherlands	x	
Nicaragua	x	x
Norway	x	
Panama	x	x
Philippines	x	
Portugal	x	
Solomon Islands		
Sweden	x	
Tuvalu		
Uruguay	x	x
Vanuatu		
Venezuela	x	x
Total: 30 countries		

ABOLITIONIST BY LAW FOR ORDINARY
CRIMES ONLY.

(Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances such as wartime)

Argentina	x	x
Brazil		
Canada	x	
Cyprus	x	
El Salvador	x	x
Fiji		
Israel	s	
Italy	x	

	<u>ICCPR</u>	<u>AMER CONV</u>
Malta		
Mexico	x	x
Monaco		
New Zealand	x	
Papua New Guinea		
Peru	x	x
San Marino	x	
Spain	x	
Switzerland		
United Kingdom	x	
Total: 18 countries		

RETENTIONIST

(Countries and territories whose laws provide for the death penalty for ordinary crimes. However, some of these countries have not in practice carried out executions in recent years.)

	<u>ICCPR</u>	<u>AMER CONV</u>	<u>JUV** PROHB</u>
Afghanistan	x		x
Albania			x
Algeria	s		x
Angola			x
Anguilla			x

** This column indicates countries which have prohibitions against the execution of juvenile offenders in their national legislation based on a July 3, 1986, AI survey. This survey is not necessarily complete and other countries may also have such legislation.

	<u>ICCPR</u>	<u>AMER CONV</u>	<u>JUV PROHB</u>
Antigua and Barbuda			x
Bahamas			x
Bahrain			
Bangladesh			
Barbados	x	x	
Belgium	x		
Belize			
Benin			
Bermuda			
Bhutan			
Botswana			x
British Virgin Islands			x
Brunei Darussalam			x
Bulgaria	x		x
Burkina Faso			
Burma			
Burundi			
Cameroon	x		
Cayman Islands			
Central African Republic	x		
Chad			
Chile	x	s	
China (People's Republic)			
Comoros			
Congo	x		
Cuba			
Czechoslovakia	x		x
Djibouti			
Dominica			x
Egypt	x		x
Equatorial Guinea			
Ethiopia			
Gabon	x		

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	<u>ICCPR</u>	<u>AMER CONV</u>	<u>JUV PROHB</u>
Gambia	x		
German Democratic Republic			
Ghana			x
Greece			
Grenada		x	x
Guatemala		x	
Guinea	x		
Guinea-Bissau			
Guyana	x		
Hong Kong			
Hungary	x		x
India	x		
Indonesia			
Iran	x		
Iraq	x		
Ireland	s		
Ivory Coast			
Jamaica	x	x	x
Japan	x		x
Jordan	x		x
Kampuchea	s		
Kenya	x		
Korea (Dem. People's Rep.)			
[No. Korea]	x		
Korea (Rep.)			
[So. Korea]			
Kuwait			x
Laos			
Lebanon	x		
Lesotho			x
Liberia	s		
Libya	x		x
Liechtenstein			
Madagascar	x		
Malawi			
Malaysia			
Maldives			

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	<u>ICCPR</u>	<u>AMER CONV</u>	<u>JUV PROHB</u>
Mali	x		
Mauritania			
Mauritius	x		
Mongolia	x		
Montserrat			x
Morocco	x		
Mozambique			
Namibia			
Nepal			
Niger	x		
Nigeria			
Oman			
Pakistan			
Paraguay		s	x
Poland	x		x
Qatar			
Romania	x		x
Rwanda	x		
Saint Christopher and Nevis			x
Saint Lucia			x
Saint Vincent and the Grenadines	x		x
Samoa			
Sao Tome and Principe			
Saudi Arabia			
Senegal	x		
Seychelles			
Sierra Leone			
Singapore			
Somalia			
South Africa			
Sri Lanka	x		
Sudan	x		
Suriname	x		
Swaziland			
Syria	x		

	<u>ICCPR</u>	<u>AMER CONV</u>	<u>JUV PROHB</u>
Taiwan (Republic of China)			
Tanzania	x		
Thailand			x
Togo	x		
Tonga			
Trinidad and Tobago	x		
Tunisia	x		x
Turkey			x
Turks and Caicos Islands			x
Uganda			
Union of Soviet Socialist Republics	x		x
United Arab Emirates			
Viet Nam	x		x
Yemen (Arab Republic) [North Yemen]			
Yemen (People's Democratic Republic) [South Yemen]	x		
Yugoslavia	x		
Zaire	x		
Zambia	x		
Zimbabwe			
Total: 127 countries and territor- ies			

COUNTRIES WHICH HAVE ABOLISHED THE
DEATH PENALTY SINCE 1975

(In recent years, at least one country a year has abolished the death penalty in law or, having done so for ordinary offences, has gone on to abolish it for all offences.)

1975: Mexico abolished the death penalty for ordinary offences.

1976: Canada abolished the death penalty for ordinary offences.

1977: Portugal abolished the death penalty for all offences.

1978: Spain abolished the death penalty for ordinary offences.

Denmark abolished the death penalty for all offences.

1979: Luxembourg, Nicaragua and Norway abolished the death penalty for all offences.

Brazil¹ and Fiji abolished the death penalty for ordinary offences.

¹ Brazil had abolished the death penalty in 1882 but reintroduced it in 1969 while under military rule.

1980: Peru abolished the death penalty for ordinary offences.

1981: France abolished the death penalty for all offences.

1982: The Netherlands abolished the death penalty for all offences.

1983: Cyprus and El Salvador abolished the death penalty for ordinary offences.

1984: Argentina² and Australia abolished the death penalty for ordinary offences.

1985: Australia abolished the death penalty for all offences.

1987: Haiti and the Philippines abolished the death penalty for all offences.

Moves to reintroduce the death penalty have been defeated in a number of countries in recent years.

² Argentina had abolished the death penalty for all offences in 1921 and again in 1972 but reintroduced it in 1976 following a military coup.

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Supreme Court, U.S.
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MAY 14 1987

JOSEPH F. SPANGL, JR.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,
Petitioner,
v.

STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the
Court of Criminal Appeals of the State of Oklahoma

BRIEF OF THE NATIONAL LEGAL AID
AND DEFENDER ASSOCIATION,
THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS,
AND THE AMERICAN JEWISH COMMITTEE
AS *AMICI CURIAE* IN
SUPPORT OF PETITIONER

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membership of over 4,000 lawyers. It is concerned with the protection of individual rights and the improvement of criminal law practice and procedures.

The American Jewish Committee (AJC) is an organization of some 50,000 members which was founded in 1906, primarily to protect the civil and religious rights of Jews. AJC, however, has also been deeply committed to assuring liberty and justice for all Americans.

SUMMARY OF ARGUMENT

Amici begin with the assumption—accepted by the State of Oklahoma in *Eddings v. Oklahoma*, 455 U.S. 104 (1982)—that there is *some* age below which execution becomes cruel and unusual punishment. This brief addresses the question invited by such an assumption: At what age does our culture set the line? *Amici*'s answer is age 18. Throughout our legal system, we recognize age 18 as the dividing line between adult responsibilities and childhood. That is the only principled line here as well.

In most states and for most purposes, minority status—defined as lower than age 18—confers a host of legal disabilities. Minors are treated differently because minors *are* different: The diverse legal disabilities are bottomed on the common sense and empirically supportable notion that minors lack maturity, judgment, impulse control and experience. Finally, exemption of minors from capital punishment will not detract from the penological justifications for the death penalty. Exclusion of minors from the death penalty would not abate the deterrent force of the penalty for other minors, since adolescents are less likely to commit the sort of coldly calculated crimes that the death penalty may be expected to deter. Exemption of minors from execution would not dilute deterrence for adults, because adults would most likely not identify with condemned minors. Juvenile executions also are so rare that preclusion of such executions can have little impact on the deterrence of the population at large. Jury be-

havior demonstrates that execution of minors would not materially advance the interest in retribution: Juries, the representatives of the community whose outrage is being expressed by death sentences, seldom vote to condemn minors.

ARGUMENT

THE EXECUTION OF A YOUTH WHO WAS UNDER THE AGE OF EIGHTEEN AT THE TIME OF THE OFFENSE WOULD VIOLATE EVOLVING STANDARDS OF DECENCY

The cruel and unusual punishments clause of the eighth amendment, made binding upon the states through the fourteenth amendment, prohibits punishments that violate "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), as those standards are revealed by history and tradition, legislative enactments, and actual jury verdicts. *Tison v. Arizona*, 55 U.S.L.W. 4496, 4499 (U.S. April 21, 1987); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977). The execution of a youth for an offense committed when he was under age 18 violates contemporary norms and is therefore unconstitutional.

When it last argued to the Court that minors may be put to death, the State of Oklahoma conceded that "it would be cruel and unusual punishment to impose the death penalty on an individual who was ten years old [T]hat by itself would be enough to convince anybody, including this Court, that a ten-year-old person under no circumstances should receive the death penalty." Transcript of Oral Argument (November 2, 1981) at 28, *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The age of ten was not hypothetical. The youngest children known to have been executed in the United States were two ten-year-olds: A Black child, whose name has been lost to history and who was hanged in Louisiana in 1855, and

James Arcene, a Cherokee Indian child hanged in Arkansas in 1885.²

Today, we intuitively recoil at the thought of putting a ten-year-old child to death. This reaction reflects a century-old evolution both in the law and in the culture within which the law evolves, an evolution towards recognition of a special concern for young people. The vexing question then becomes: At what age does this special concern for young people give way to an insistence that they pay the ultimate price for their acts?

This question was presented in *Eddings v. Oklahoma*, 455 U.S. 105 (1982), but the Court did not reach the constitutionality of inflicting the death penalty on juveniles. *Id.* at 110 n.5. Instead, the Court remanded *Eddings'* death sentence to the Oklahoma courts with instructions to "consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." *Id.* at 117. *Eddings* held that "youth must be considered a relevant mitigating factor." *Id.* at 115. *Amici* submit that the individualized consideration of the defendant's age required by *Eddings* is insufficient to prevent the imposition of death sentences which are cruel and unusual under contemporary standards.³ The facts

² Streib, *Death Penalty for Children: The American Experience With Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 Okla. L. Rev. 613, 619-20 (1983). Estimates of the youngest person put to death in this century vary. One commentator opined that "since 1900, the youngest has been 13-year-old Fortune Ferguson, Jr., electrocuted at the Florida State Prison on April 27, 1927." *Id.* at 620. Another writer argued that George Stinney, executed at age 14 by South Carolina in 1944, was the youngest person put to death in this century. Bruck, *Executing Teen Killers Again: The 14-Year-Old Who, in Many Ways, Was Too Small for the Chair*, Washington Post, Sept. 15, 1985, at D1.

³ In *Eddings*, the death sentence was reinstated by the trial judge following remand from this Court. *Eddings v. State*, 688 P.2d 342, 343 (Okla. Crim. App. 1984), *cert. denied*, 470 U.S. 1051 (1985). The Oklahoma Court of Criminal Appeals modified the sentence to life imprisonment. *Id.*

of the case before the Court starkly illustrate the need to draw a line between childhood and adulthood that reflects our shared notions of responsibility and culpability.

Amici will demonstrate that the eighth and fourteenth amendments require that a person be eighteen years or older at the time of the offense to be subject to the death penalty.⁴ Drawing the line at any given age should be "informed by objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). In this case the line is easier to identify than most: Throughout our legal system, we recognize age eighteen as the dividing line between adult responsibility and childhood.

A. In Most States and for Most Purposes, Age Eighteen Marks the Boundary Between Childhood and Adult Responsibilities

The "law has generally regarded minors as having a lesser capability for making important decisions," *Carey v. Population Services International*, 431 U.S. 678, 693 n.15 (1977), and "recognizes a host of distinctions between the rights and duties of children and those of adults." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985) (Powell, J., concurring). Because of these distinctions, the Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982). The "State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel

⁴ The relevant age should, of course, be age at the time of the offense rather than age at the time of trial. *See, e.g.*, Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards, Standards Relating to Transfer Between Courts*, Commentary to Standard 1.1, at 15 (1980).

where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent." *H. L. v. Matheson*, 450 U.S. 398, 421-22 (1981) (Stevens, J., concurring) (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., dissenting)); see also *Danforth*, 428 U.S. at 95 & n.2 (White, J., dissenting). The "experience of mankind, as well as the long history of our law, recogniz[es] that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office." *Goss v. Lopez*, 419 U.S. 565, 590-91 (1975) (Powell, J., dissenting) (emphasis in original).

In Oklahoma, a minor—defined as a person under age 18 unless otherwise provided by statute—⁵ cannot vote; ⁶ cannot sit on a jury; ⁷ cannot marry without permission of a parent or guardian; ⁸ cannot possess alcohol; ⁹ cannot purchase cigarettes; ¹⁰ cannot patronize bingo par-

⁵ Okla. Stat. Ann. tit. 15, § 13 (West 1983). Prior to 1972, Oklahoma defined the commencement of civil majority as age 18 for females and age 21 for males; females were held criminally responsible as adults at age 18 and males at age 16. *Craig v. Boren*, 429 U.S. 190, 197 (1976). In 1972, age 18 was established as the age of majority for males and females for civil and criminal purposes. *Id.*

⁶ Okla. Const. art. 3, § 1.

⁷ Okla. Stat. Ann. tit. 38, § 28 (West Supp. 1987).

⁸ Okla. Stat. Ann. tit. 43, § 3 (West 1979) (age 18).

⁹ Okla. Stat. Ann. tit. 21, § 1215 (West 1983) (age 21).

¹⁰ Okla. Stat. Ann. tit. 21, § 1241 (West Supp. 1987) (age 18).

lors ¹¹ or pool halls; ¹² cannot pawn property; ¹³ cannot consent to services by health professionals for most medical care, unless he is married or otherwise emancipated; ¹⁴ cannot donate blood without parental permission; ¹⁵ may disaffirm any contract, except for "necessaries"; ¹⁶ and may not operate or work at a shooting gallery.¹⁷ The Oklahoma delinquency statutes define "child" as "any person under the age of eighteen."¹⁸

Oklahoma is not unique; minority status universally confers a host of disabilities.¹⁹ Eighteen years is the line selected by Congress and the states in their enactment and ratification of the twenty-sixth amendment to the Constitution, governing voting age. Following extensive

¹¹ Okla. Stat. Ann. tit. 21, § 995.13 (West 1983) (age 18).

¹² Okla. Stat. Ann. tit. 21, § 1103 (West 1983) (age 18).

¹³ Okla. Stat. Ann. tit. 59, § 1511 (West Supp. 1987) (age 18).

¹⁴ Okla. Stat. Ann. tit. 32, § 2602 (West 1984) (age 18 unless in Armed Services).

¹⁵ Okla. Stat. Ann. tit. 63, § 2152 (West 1983) (age 18).

¹⁶ Okla. Stat. Ann. tit. 15, §§ 19, 20 (West 1983) (age 18).

¹⁷ Okla. Stat. Ann. tit. 63, § 703 (West 1984) (age 21).

¹⁸ Okla. Stat. Ann. tit. 10, § 1101 (West 1987).

¹⁹ See generally Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L.J. 757, 775-80 (1986); United States Department of Health and Human Services, *The Legal Status of Adolescents* 1980 (1981). These legal disabilities are not without exceptions. The "emancipation" of a minor—by, for example, marriage or enlistment in the armed services—may free him from the legal disabilities prior to the actual date of his majority. See, e.g., Cal. Civ. Code Ann. § 62 (West 1954 & Supp. 1986); Utah Code Ann. § 15-2-1 (Supp. 1986). However, parental consent is required for minors to marry, see Appendix C, or to enlist in the military. 50 U.S.C. § 454 app. (c) (1981). The "mature minor" notion also permits a child to consent to medical treatment if he is capable of appreciating its nature and consequences. See, e.g., Ark. Stat. Ann. § 82-363(g) (1976 & Supp. 1986). Few jurisdictions recognize this concept, however.

hearings,²⁰ both state and federal legislatures agreed to give constitutional significance to age 18 as the time when young people should first be permitted to participate in the most basic civic responsibility of adults in our democracy. Eighteen also is the minimum age at which a citizen may be drafted into the armed services as well as the minimum age at which a person may enlist without parental consent. 50 U.S.C. app. § 454(a), (c) (1981).

In most states and for most purposes, a "minor" means one below age 18:

- Forty-four jurisdictions set age 18 as the age of majority; two jurisdictions set the age at 21, three at 19, and two do not set a uniform age of majority. *See* Appendix A.
- Forty-three jurisdictions require jurors to be 18 years or older, while three require jurors to be at least 19 years and five require jurors to be at least 21. *See* Appendix B.
- In fifty jurisdictions, both parties must be at least 18 years old to marry without parental consent. In one jurisdiction, both parties must be at least 21 years old. *See* Appendix C.
- Thirty-seven jurisdictions establish 18 (unless the minor is emancipated) as the age of consent for all forms of non-emergency medical treatment; one jurisdiction puts the age at 17, one jurisdiction puts the age at 16, one sets the age at 15, one jurisdiction puts the age at 14, two permit treatment if the minor is able to understand the decision, and eight jurisdictions have no legislation in this area. *See* Appendix D.

²⁰ *See Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional Amendments of the Sen. Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970); S. Rep. No. 92-26, 92d Cong., 1st Sess. (1971); H.R. Rep. No. 92-37, 92d Cong., 1st Sess. (1971).

- Thirty-three jurisdictions require a person to be 18 to receive a driver's license without parental consent; four jurisdictions set the age at 17, while fourteen set it at 16. *See* Appendix E.
- In forty jurisdictions, a person must be at least 18 to purchase pornographic materials; six jurisdictions set the age at 17, two jurisdictions set it at 16, one sets it at 19, one has simply outlawed obscenity by statute, and one jurisdiction has no legislation in this area. *See* Appendix F.
- Of the thirty-nine jurisdictions which permit gambling, thirty-one set the minimum age at 18, four set it at 21, one sets it at 19, one at 17, and two at 16. *See* Appendix G.
- Of the twenty-three jurisdictions which set a minimum age for admission to pool halls, nineteen jurisdictions put the age at 18, two set the age at 16, while one jurisdiction puts the age at 21, and one puts it at 19. *See* Appendix H.
- Of the thirty-one jurisdictions which set a minimum age for the right to pawn property, or to sell to junk or precious metals dealers, twenty-eight set the age at 18, while three set the age at 16. *See* Appendix I.
- In twenty-five jurisdictions, a person must be at least 18 years old to work in a hazardous occupation. One jurisdiction puts the age at 17, twenty-two jurisdictions set the age at 16, and three put it at 14. *See* Appendix J.
- Many localities have juvenile curfew ordinances.²¹ The "most common upper age limit"

²¹ A 1957 study revealed that more than 50% of all cities with populations of greater than 100,000 had juvenile curfew ordinances on the books. Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. Pa. L. Rev. 66, 66-68 & n.5 (1958). A more recent commentator observed that "thousands of cities" have had such ordinances for "a long time." F. Zimring, *The Changing Legal World of Adolescence* 13 (1982). The District of Columbia is the most recent jurisdiction to consider such an ordi-

is 18. Comment, *Juvenile Curfew Ordinances and the Constitution*, 76 Mich. L. Rev. 109, 140 (1977).

Contemporary attitudes toward minors are reflected further in the development of juvenile justice systems. "Juvenile courts exist because Americans admit to a fundamental difference between children and adults." Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards, Standards Relating to Transfer Between Courts 1* (1980). Every state has a comprehensive juvenile court system, *Kent v. United States*, 383 U.S. 541, 554 n.19 (1966), the principal purpose of which is to rehabilitate²² and the premise of which is that minors are not fully responsible for their offenses and therefore should be treated more benignly than their adult counterparts. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 551-52 (1971) (White, J., concurring); Institute of Judicial Administration/American Bar Association, *Juvenile Standards, Standards Relating to Transfer*

nance; the proposed D.C. law would set the age at 18. LaFraniere, *Minors' Entertainment Curfew Sought in D.C.*, Washington Post, May 6, 1987, at C1.

²² To be sure, the "fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized." *McKeiver v. Pennsylvania*, 403 U.S. 528, 543-44 (1971); see also *In re Winship*, 397 U.S. 358 (1970). But the disappointments have turned more on "the availability of resources, on the interest and commitment of the public, on the willingness to learn, and on understanding as to cause and effect," *McKeiver*, 403 U.S. at 547, rather than on fundamental flaws in the juvenile court philosophy. The Court's cases, such as *McKeiver* and *Winship*, confirm that virtually none of "[t]he serious critics of the juvenile court experiment . . . question the initial decision that adolescents ought to be handled in a legal process separate from adults. The battle is over the treatment of adolescents within the separate process." Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7, 8; see also President's Commission on Law Enforcement and Administration of Justice, Task Force Report: *Juvenile Delinquency and Youth Crime* 9 (1967) (quoted in *McKeiver v. Pennsylvania*, 403 U.S. 528, 546 n.6 (1971)).

Between Courts 1 (1980); *The Juvenile Court and Serious Offenders*, 35 Juv. & Family Ct. J. (Preamble) (Summer 1984). In particular, the legislation establishing juvenile court jurisdiction supports the proposition that age 18 is the relevant cut-off point between childhood and adult responsibilities. Thirty-seven states and the District of Columbia designate 18 years as the appropriate maximum age for juvenile court jurisdiction; one state sets the age at 19, eight set the age at 17, and four set the age at 16. S. Davis, *Rights of Juveniles: The Juvenile Justice System*, App. B (1986); accord National Institute for Juvenile Justice and Delinquency, U.S. Department of Justice, Major Issues in Juvenile Justice Information and Training, *Youth in Adult Courts: Between Two Worlds* 44, 86 n.2 (1982). Most model standards reflect the judgment of the vast majority of jurisdictions which set age 18 as the boundary of juvenile courts.²³ The Institute of Judicial Administration and the American Bar Association, for example, proposed that the "eighteenth birthday should define an adult for the purposes of court jurisdiction" because the "eighteenth birth-

²³ United States Department of Health, Education and Welfare, Welfare Administration, Children's Bureau, *Standards For Juvenile and Family Courts* 36 (1966) ("Successful experience in these courts over many years has established the soundness of this age level [18 years] of Jurisdiction"); National Conference of Commissioners on Uniform State Laws, *Uniform Juvenile Court Act of 1968*, Section 2.1(i) (1979) (18 years); United States Department of Justice, National Institute for Juvenile Justice and Delinquency Prevention, Working Papers of the National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention, *Jurisdiction—Delinquency*, Vol. IV, at 10-11 (1977) (18 years); Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards, Standards Relating to Transfer Between Courts*, Standard § 1.1A and Commentary (1980) (18 years); Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards, Standards Relating to Juvenile Delinquency and Sanctions*, Standard 2.1 and Commentary (1980) (18 years); Twentieth Century Fund Task Force on Sentencing Policy toward Young Offenders, *Confronting Youth Crime* 9 (1978) (18 years).

day signals the achievement of majority for many legal purposes. The twenty-sixth amendment to the United States Constitution establishes a constitutional right to vote in federal elections at that age. This near consensus among the states and the federal government argues compellingly that juvenile court jurisdiction should end at eighteen." Standards Relating to Transfer Between Courts, *supra*, Commentary to Standard 1.1A.²⁴

The limitation of eligibility for the death penalty to those eighteen years or older at the time of the offense is supported by the American Bar Association, the American Law Institute's Model Penal Code and the National Commission on Reform of Federal Criminal Laws. The ABA passed a resolution in 1983 opposing "the imposi-

²⁴ We recognize that while every state and the District of Columbia has a juvenile justice system, most jurisdictions also have mechanisms permitting transfer of otherwise juvenile cases into the adult criminal justice system. At least three states—New York, Nebraska and Arkansas—do not provide for waiver of jurisdiction. S. Davis, *supra* at 4-1. Moreover, the broad consensus of the 38 jurisdictions that recognize age 18 as the general limit to juvenile court jurisdiction demonstrates that our society recognizes age 18 as a crucial watershed in an individual's development. Whatever courts may be chosen to try a juvenile under 18 charged with murder by operation of transfer provisions, our evolving standards of decency forbid execution of such an offender.

This conclusion is consistent with the rationale underlying transfer provisions: namely, there are certain juveniles who will require punishment or treatment beyond the age of eighteen, the jurisdictional limitations for most juvenile courts. By permitting transfer of these juveniles to the adult system, these courts gain jurisdiction to ensure that the penal system will have sufficient time both to exact the necessary punishment and to attempt rehabilitation. Furthermore, the decision to transfer a juvenile into the adult court system does not turn on questions of individualization and criminal responsibility, both constitutionally indispensable in deciding whether to impose the death penalty. Transfer and capital sentencing simply ask different questions. Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. & Criminology 1471, 1499-1501 (1983).

tion of capital punishment upon any person for any offense committed while under the age of eighteen." See American Bar Association Report No. 117A, approved August 1983; see also Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 Clev. St. L. Rev. 363, 388 (1987). This resolution is especially significant because it is the first time in its history that the ABA has taken a formal position on any aspect of capital punishment. The American Law Institute's Model Penal Code has, since 1962, contained a recommendation that the death penalty not be imposed on offenders below age eighteen. See American Law Institute, Model Penal Code § 210.6(1)(d) (Proposed Official Draft 1962). This view was reaffirmed by revisers of the Code in 1980, despite suggestions that the age be lowered or that youth merely be considered as a mitigating circumstance. See American Law Institute, Model Penal Code § 210.6, Comment at 133 (Official Draft and Revised Comments 1980). The National Commission on Reform of Federal Criminal Laws also took the position that 18 ought to be the minimum age. See National Commission on Reform of Federal Criminal Laws, Final Report of the New Federal Code § 3603 (1971).

The domestic legislative evidence that age 18 is the appropriate boundary between juvenile and adult responsibility coincides with international law. Although incomplete, "[t]he available evidence of contemporary state practice in the application of the death penalty seems to establish a remarkably consistent adherence to the prohibition on execution of juvenile offenders in all regions and political systems." Hartman, *Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. Cin. L. Rev. 655, 666 (1983). Of the 164 countries for which data were available, 122 imposed the death penalty. Significantly, of these 122 countries, 45 had statutory provisions recognizing youth as exempt from the death pen-

alty: 29 nations set the minimum age at 18, one sets the age at 21, three at 20, five at 16, and five prohibited the execution of "minors" while two others prohibited the execution of "young people." *Id.* at 666-67 n.44. The significance of these figures is not so much that nations set a minimum age, but that two-thirds of those which did set the age at 18. Equally significant, of 81 nations which were reported to have actually executed persons in the period between 1973 and 1982, only two states officially reported executions of juveniles. *Id.* Out of the thousands of executions recorded by Amnesty International throughout the world between January 1980 and May 1986, only eight in four countries were reported to have been of persons who were under age 18 at the time of the crime; three of these eight executions occurred in the United States. See Amnesty International, *United States of America: The Death Penalty* 74 (1987).²⁵ An earlier study in 1965 found that out of 95 countries reporting, 61 set age 18 as the minimum age for capital punishment. See Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. Crim. L., Criminology, & P.S. 397, 398-404 (1965). Reports of the Secretary General of the United Nations confirm that "the great majority of Member States report never condemning to death persons under 18 years of age." See United Nations, Economic and Social Council, Report of the Secretary General, *Capital Punishment* 17 (1973). It is telling that the 36 condemned juveniles on America's death row could not have been sentenced to death if they had been convicted in the Soviet Union, China, Iran, Iraq, or South Africa.

The policy of the United States has also reflected these international norms. In 1977, the United States became

²⁵ Even if executions of juveniles abroad are underreported, these numbers remain compelling: A nation's unwillingness to admit execution of minors is itself evidence of a norm against that practice.

a signatory to two international human rights treaties that prohibit execution for crimes committed before age 18. The International Covenant on Civil and Political Rights, which has been ratified by 81 nations and signed by another nine nations, provides that death "shall not be imposed for crimes committed by persons below eighteen years." See *Multilateral Treaties Deposited With the Secretary General of the U.N.*, at 124, U.N. Doc. ST/LEG/Ser.E/3 (1985). Similarly, the American Convention on Human Rights, ratified by 19 American nations and signed by an additional three countries, provides that capital punishment "shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age." See *Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/11.65, Doc. 6, at 63 (July 1, 1985). President Carter signed both treaties in 1977. The Senate has not yet ratified either covenant. Based on the policies embedded in these treaties and other materials, the Inter-American Commission on Human Rights recently found an emerging—although not yet extant—norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty. See Resolution N, Inter-American Commission on Human Rights, Organization of American States, OEA/Ser.L/V/11.69, Doc. 17, at 38 (March 27, 1987).

The laws and policies discussed in this section reflect an almost universal judgment that adolescents ought to be treated differently than adults. There generally are no exceptions to that judgment. Public officials do not consider requests by especially mature adolescents to allow them to vote, serve as jurors, or drink alcoholic beverages. As a society, we treat those under age 18 as categorically different from adults.²⁶ These lines reflect clear distinc-

²⁶ If there is any other arguable contender to age 18, it must be age 21. In 1984 Congress overwhelmingly passed the National Minimum Drinking Age Act withholding federal highway funds

tions between children and adults, distinctions that require this Court to draw the line at age 18 for the imposition of the death penalty.

B. The Reasons for the Boundary Line: Adolescents Lack the Maturity, Experience, Moral Judgment and Sophistication of Adults

The various legal disabilities discussed above are bottomed on the common sense and empirically supportable assumption that minors lack the maturity, experience, sophistication and judgment necessary to make important decisions. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. Rev. 605, 644-50. That assumption is what these legal disabilities are all about: "Children, by definition, are not

from states that failed to raise their drinking age to 21. The House of Representatives agreed to the measure by unanimous consent. See 130 Cong. Rec. H7220-H7223 (daily ed. June 27, 1984); 130 Cong. Rec. H5395-H5407 (daily ed. June 7, 1984). The focus of the Senate debate was whether teenagers should be singled out for special treatment. 129 Cong. Rec. S8243 (daily ed. June 26, 1984) (remarks of Sen. Chafee); *id.* at S8246 (remarks of Sen. Byrd); *id.* at S8231 (remarks of Sen. Exon); *id.* at S8209 (remarks of Sen. Lautenberg); *id.* at S8212 (remarks of Sen. Pell); *id.* at S8214 (remarks of Sen. Specter); *id.* at S8237-38 (remarks of Sen. Durenberger); *id.* at S8210; 20 Weekly Comp., Pres. Doc. 1036 (July 17, 1984).

We recognize that the constitutionality of this legislation is a matter presently under plenary consideration by the Court in *South Dakota v. Dole*, 107 S. Ct. 869 (1987) (order granting certiorari). The outcome of *Dole* will not affect our point here: The ultimate validity or invalidity of the statute does not minimize the importance of the congressional recognition that teenagers are particularly vulnerable to exercising poor judgment and need special protections. Further, no party to the *Dole* litigation seems to dispute that teenagers need special protections. Brief of Petitioner at 19, 62, 68; Brief of *Amici Curiae*, National Beer Wholesalers' Association and 46 State Beer, Wine and Distilled Spirits Associations in Support of Petitioner, at 17, *South Dakota v. Dole*, No. 86-260.

assumed to have the capacity to take care of themselves." *Schall v. Martin*, 467 U.S. 253, 265 (1984). For example, in *Oregon v. Mitchell*, the states sought to "justify exclusion of 18- to 21-year-olds from the voting rolls solely on the basis of the states' interests in promoting intelligent and responsible exercise of the franchise." 400 U.S. 112, 243 (1970) (Brennan, White & Marshall, JJ., dissenting).

The Court has long "assume[d] that juvenile offenders constitutionally may be treated differently from adults," *Bellotti v. Baird*, 443 U.S. 622, 635 (1979), and has long recognized that "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *Eddings*, 455 U.S. at 116 n.12 (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)). The Court has often expressed the rationale underlying this distinction, explaining that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti*, 443 U.S. at 635; see also *H. L. v. Matheson*, 450 U.S. 398, 409-11 (1981).

[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.

Eddings, 455 U.S. at 115-16 (footnote omitted); see also *Skipper v. South Carolina*, 106 S. Ct. 1669, 1675 (1986) (Powell, J., concurring); *New York v. Ferber*, 458 U.S. at 776 (Brennan & Marshall, JJ., concurring) (noting

"the particular vulnerability of children"); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions"); *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) ("a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees") (footnote omitted).

[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.

Eddings, 455 U.S. at 116 n.11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)); see also *Skipper v. South Carolina*, 106 S. Ct. at 1675 (Powell, J., concurring); *Haley v. Ohio*, 332 U.S. 596, 599 (1948); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962).

"[A]s any parent knows, children at certain ages are inclined to test the outer boundaries of acceptable conduct" *T.L.O.*, 469 U.S. at 352 (Blackmun, J., concurring). The Court has recognized the "period of great instability which the crisis of adolescence produces." *Haley*, 332 U.S. at 599.

During the "crisis of adolescence" noted in *Haley*, minors are less mature in their ability to make sound judgments and are less able to control their conduct and to recognize the consequences of their acts. Adolescence

is a time²⁷ when young persons frequently are struggling to arrive at a definition of their own identity; adolescents are particularly likely to rebel against adult authority and to seek affirmation by their peers. E. Erickson, *Childhood and Society* 261-63 (2d ed. 1963). The teen years are "a period of experiment, risktaking and bravado. Some criminal activity is part of the patterns of almost all youth subcultures." Twentieth Century Fund Task Force, *supra*, at 3. The adolescent's intellectual capability to consider and to choose from the realm of possibilities in a comprehensive fashion emerges only in late adolescence and early adulthood. E. Peel, *The Nature of Adolescent Judgment* 153 (1971). Moral character is to a large degree a product of the maturation process. Kohlberg, *Development of Moral Character and Moral Ideology*, in *Review of Child Development Research* 383, 409 (M. Hoffman & L. Hoffman eds. 1964); Rest, Davison & Robbins, *Age Trends in Judging Moral Issues*, 49 *Child Development* 263 (1978). The ability to make moral judgments depends, at least in part, on broader factors of social experience. Most adolescents simply do not have the breadth and depth of experience which are essential to making sound judgments and to understanding the long-range consequences of their decisions.

Many adolescents possess a "profound conviction of their own omnipotence and immortality. Thus many adolescents may appear to be attempting suicide, but they do not really believe that death will occur." Miller, *Adolescent Suicide: Etiology and Treatment*, in *Adolescent Psychiatry* 327, 329 (S. Feinstein, J. Looney, A. Schwartzberg & A. Sorosky eds. 1981); see also Hostler, *The Develop-*

²⁷ Adolescence lasts roughly from age 12 to age 19. Gordon, *The Tattered Cloak of Immortality*, in *Adolescence and Death* 12, 17-19 (C. Coor & J. McNeil eds. 1986).

ment of the Child's Concept of Death, in *The Child and Death* 19 (O. Sahler ed. 1978).²⁸

For this reason, threatening a child with death does not have the same impact as threatening an adult with death. "[I]mmature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences" *Bellotti*, 443 U.S. at 640-41. Adolescents live for the moment, for "an intense present," with little thought of the future consequences of their actions. Kasterbaum, *Time and Death in Adolescence*, in *The Meaning of Death* 99, 104 (H. Feifel ed. 1959). The defiant attitudes and risk-taking behaviors of some adolescents are related to their "developmental state of defiance about danger and death." Fredlund, *Children and Death from the School Setting*, 47 J. School Health 533, 535 (1977). They typically have not learned to accept the finality of death. Hostler, *The Development of the Child's Concept of Death*, in *The Child and Death* (O. Sahler ed. 1978). Adolescents tend to view death as a remote possibility; old people die, not teenagers. "Risk-taking with body safety is common in the adolescent years, through sky diving, car racing, excessive use of drugs and alcoholic beverages." Gordon, *supra*, at 27. Such "chance games" are played by adolescents "out of their own sense of omnipotence." Miller, *supra*, at 329.

Further, most adolescents grow up. "For most adolescents, age alone is the cure of criminality." F. Zimring, *Background Paper*, in Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *supra*, at 37; J. Wilson & R. Herrnstein, *Crime and*

²⁸ This may help explain a recent rash of teenage suicides that has focused national attention on the issue. See, e.g., 2 *Illinois Suicides Similar to New Jersey Teen-Agers*, Washington Post, March 14, 1987, at A3. Suicide is the third leading cause of death among teenagers. Adler & Dolcini, *Psychological Issues and Abortion for Adolescents*, in *Adolescent Abortion* 84 (G. Melton ed. 1986).

Human Nature 144 (1985). Youth is a "time of intense and unfulfilled passions, leading to crimes for goods and pleasures that older people either crave less or can enjoy legally." *Id.* at 145. Simply stated, an adult is likely to have a lower propensity for crime than a youngster because the adult is older. "Age, like gender, resists explanation because it is so robust a variable. *None of the correlates of age, such as employment, peers, or family circumstances, explains crime as well as age itself.*" *Id.* (footnotes and reference omitted) (emphasis added).²⁹

The legislative judgment, nearly universal among the states, that society should treat adolescents and adults differently, and the developmental differences upon which that judgment is based, compel the conclusion that adolescents should be spared from the death penalty, at least until they reach age 18.

C. The Reasons for Treating Children Differently From Adults Apply With Special Force Here: The Developmental Differences Between Adolescents and Adults Diminish the State's Interest in Inflicting the Death Penalty on Minors

The "Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Coker*, 433 U.S. at 597; *accord Enmund*, 458 U.S. at 797; *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976). This independent judgment is

²⁹ Statistics suggest that as people move from the turbulence of adolescence to the calmer period of the early twenties, they commit fewer crimes, whether or not they were apprehended or participated in a rehabilitation program. See Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, *Assessing the Relationship of Adult Criminal Careers to Juvenile Careers: A Summary* 4 (1982); cf. Federal Bureau of Investigation, U.S. Dept. of Justice, *Crime in the United States: 1978, 194-96* (1979); Zimring, *American Youth Violence: Issues and Trends*, in *Crime and Justice: An Annual Review of Research* 67 (N. Morris & M. Tonry eds. 1979) (rates of many kinds of criminality peak in mid-adolescence).

informed by the twin penological justifications for the death penalty: general deterrence and retribution. *Tison v. Arizona*, 55 U.S.L.W. at 4499-500; *Skipper v. South Carolina*, 106 S. Ct. at 1675-76 (Powell, J., concurring); *Enmund*, 458 U.S. at 798-99; *Gregg*, 428 U.S. at 183-87. Preclusion of juvenile executions would undermine neither of these goals.

1. General Deterrence

The "death penalty has little deterrent force against defendants who have reduced capacity for considered choice." *Skipper*, 106 S. Ct. at 1675 (Powell, J., concurring). The death penalty may be expected to deter only those who engage in a "cold calculus that precedes the decision to act," those who "carefully contemplate[]" their crimes. *Gregg*, 428 U.S. at 186; see also *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting); W. Bowers, *Legal Homicide* 272 (1984). "The socialization processes, which include the internalization of a society's moral norms and prohibitions, undoubtedly play a role in general deterrence." Gale, *Retribution, Punishment, and Death*, 18 U.C. Davis L. Rev. 973, 995 (1985) (footnote omitted).

Amici have demonstrated above that with adolescents the socialization process is as yet incomplete; for this reason, capital punishment will not likely deter other minors from committing crimes. Adolescents are less likely than adults to calculate rationally; this, indeed, is the premise underlying the states' guardianship and protection of minors. It is unlikely that cold, rational calculation is involved when juveniles commit crimes. See C. Bartollas, *Juvenile Delinquency* 102 (1985). Our culture assumes for countless other purposes that minors, prior to acting, do not engage in the sort of responsible risk-benefit analysis that lies at the core of the deterrence theory. And when adolescents do calculate, the fear of death will not be given its fair measure. Adolescents have not learned to accept death's finality.

Moreover, execution of minors will fail to deter the general population from committing crimes. Potential murderers are most likely to be deterred by the execution of one with whom the potential killer can identify; put another way, execution of a person who is particularly distinguishable from the general population will not serve to deter members of the general population. Cf. A. Goldstein, *The Insanity Defense* 13 (1967); Liebman & Shephard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 Geo. L.J. 757, 813-17 (1978). Nor will exclusion of minors from execution abate the deterrent force of the death penalty for adults. Finally, because juvenile executions are so rare, their preclusion would have little impact on the deterrence of the population at large. See generally Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. & Criminology 1471, 1510-13 (1983).

2. Retribution

In addition to deterrence, the Court has said that retribution—the expression of society's outrage at particularly offensive conduct—remains a legitimate penological goal of capital punishment. *Spaziano v. Florida*, 468 U.S. 447, 461-62 (1984); *Enmund*, 458 U.S. at 800-01; *Gregg*, 428 U.S. at 183. But such outrage is tempered when the defendant is an adolescent: *Juries*, the representatives of the community whose outrage is being expressed by death sentences, seldom vote to condemn teenagers.

The actual practice of sentencing minors to die, and of actually executing them, has declined to a remarkably low level. As of December, 1983, only thirty-eight (2.9%) of the 1,289 persons on death row were under age eighteen at the time of their crimes.³⁰ By July of 1986, the

³⁰ Streib, *supra*, 34 Clev. St. L. Rev. at 384. We assume that all of these cases involved jury sentences of death. Although four states exclude the jury from the capital sentencing process, *Spaziano*, 468

number had dropped from thirty-eight to thirty-two, while the population of death row had increased by 500. Streib, *supra*, 34 Clev. St. L. Rev. at 384. Thus, while the death row population grew by 42% (from 1,250 to 1,770), the juvenile death-row population decreased by 16%.

Even more strikingly, only seven new juveniles were added to the death row population from December 1983 to March 1986. Approximately 700 total death sentences were imposed during this period. *Id.* Accordingly, juveniles accounted for only 1% of the death sentences meted out during this two and one-half year period.

Review of intentional homicide data dramatically underscores the fact that juries impose capital sentences on juveniles at a significantly lower rate than on adults. Approximately 9.2% of intentional homicides from 1973 through 1983 were committed by persons under eighteen. *Id.*³¹ In stark contrast to this 9.2% commission rate, only 2% to 3% of all capital sentences imposed over this period were imposed on juveniles. *Id.* at 387.

Most importantly, data compiled through March of 1987 establish that the juvenile capital-sentencing rate has leveled off at a dramatically low level. Over the last five years, those under age eighteen have been sentenced to death as follows: 1982—11; 1983—9; 1984—6; 1985—3; 1986—7. During this same period, the annual death-sentencing rate for adults has been approximately

U.S. at 463-64 n.9, none of these states contributed to the present population of juvenile death row. The three states permitting judges to impose death notwithstanding a jury's recommendation of life imprisonment—Alabama, Florida and Indiana—account for seven juvenile death sentences. It is not known whether the juries in these cases recommended life or death.

³¹ However, it is the 18 to 24 "age group—beyond the jurisdiction of almost all juvenile courts—that has the highest arrest rate for crimes of violence." President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 56 (1967).

300 per year.³² Juvenile death sentences are so rare that they are cruel and unusual "in the same way that being struck by lightning is cruel and unusual." *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

Some courts, upholding the constitutionality of executing minors, have focused upon legislative enactments in concluding that such executions do not offend our society's evolving standards of decency.³³ However, statutes

³² Few death sentences translates into still fewer actual executions. A 20-year national moratorium on executing minors ended when Charles Rumbaugh was executed in 1985. Rumbaugh was 17 years old at the time of the crime. Rumbaugh, however, as an adult and after a full evidentiary hearing on his competency to waive further legal action to save his life, volunteered for execution. *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir.), *cert. denied*, 473 U.S. 919 (1985). Early in 1986, Terry Roach became the first nonconsensual execution of a juvenile since 1964; Roach, however, did not allege in his first federal habeas corpus proceeding that execution of a juvenile *per se* violates the Constitution. *Roach v. Martin*, 757 F.2d 1463 (4th Cir.), *cert. denied*, 106 S. Ct. 185 (1985). Similarly, Jay Pinkerton, executed later in 1986, apparently raised the claim in a successor habeas petition. Thus, of the 70 people executed in the post-*Furman* era, only three were under the age of 18 at the time of their crime, and one of the three volunteered for execution. Further, Rumbaugh and Pinkerton—who were seventeen years old at the time of their offenses—were executed in Texas, where the maximum juvenile court age is 17. Tex. Penal Code Ann. § 8.07(d) (Vernon Supp. 1987).

³³ See, e.g., *Prejean v. Blackburn*, 743 F.2d 1091, 1098-99 (5th Cir. 1984), *modified on other grounds*, 765 F.2d 482 (5th Cir. 1985), *petition for cert. filed*, No. 85-5609; *Trimble v. State*, 300 Md. 387, 478 A.2d 1143, 1158-64 (Md. 1984), *cert. denied*, 469 U.S. 1230 (1985). In fact, legislative responses support age 18 as the minimum age for execution eligibility. As discussed *infra*, legislation places a variety of limitations upon minors, restrictions which evince a consensus that minors are less mature and responsible than adults.

As to capital punishment specifically, the legislative message is more mixed but still supportive of the notion that if an age must be chosen—and surely it must—then eighteen is the only principled

are not determinative, particularly since they have led to only a miniscule number of death sentences or executions. Death penalty legislation alone cannot reveal society's evolving standards of decency.

In the decade and a half since *Furman v. Georgia*, almost every current Justice has written or joined in opinions that look to the pattern of jury verdicts in sup-

line. Of the fifteen states that establish a minimum age for capital punishment, eleven set it at eighteen, three set it at seventeen, and one sets it at sixteen.

Further, the most recent legislative activity has been in the direction of setting 18 as the minimum age. Nebraska in 1982 set 18 as its minimum age for execution; Colorado and Oregon did so in 1985; New Jersey did so in 1986. Neb. Rev. Stat. § 28-105.01 (1985); Colo. Rev. Stat. § 16-11-103 (1986); Or. Rev. Stat. § 161-620 (1985); N.J. Stat. Ann. § 2C: 11-3f (West 1986) (L. 1985, ch. 478, § 1, approved Jan. 17, 1986). In April 1987, Maryland became the latest state to set 18 as the minimum age for capital punishment. Barnes & Schmidt, *Schaefer Praises Session As "Unusually Successful,"* Washington Post, April 14, 1987, at A7. The Governor was "struck by the fact that the decisive Senate votes came not from the newly-elected members of that Chamber, but from Senate veterans who had opposed an exemption for minors in previous years." Letter from William Schaefer to Clayton Mitchell, Speaker, Maryland House of Delegates, April 7, 1987, at 1 (reproduced at Appendix K). The Maryland House of Delegates, in putting the age at 18, reversed the Maryland Judiciary Committee, which had set the age at 16. Barnes, *Death Penalty Exemption Advances*, Washington Post, April 11, 1987, at B4. The 1987 session of the Georgia General Assembly considered such a measure. Shipp, *Restricting Use of Death Penalty is Long Overdue*, Atlanta Journal—Constitution, January 4, 1987, at 1D. The New Hampshire legislature recently re-codified and therefore reaffirmed its exemption of minors from capital punishment. HB 106, Laws 1986, ch. 82:1 (effective Jan. 1, 1987) (codified as N.H. Rev. Stat. Ann. § 630:5 (IX) to (XIII) (1986 Supp.)).

Finally, the recently proposed federal death penalty legislation was amended to provide that a sentence of death may not be imposed upon a person who was less than 18 years old at the time of the offense. *Establishing Constitutional Procedures for the Imposition of Capital Punishment: Report of the Committee on the Judiciary*, 99th Cong., 2d Sess. 30 (1986).

port of a conclusion about the death penalty's constitutionality, either generally or for particular crimes.³⁴

³⁴ Members of the Court have reasoned that the "jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved," *Enmund*, 458 U.S. at 795 (White, Brennan, Marshall, Blackmun & Stevens, JJ.) (quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (Stewart, Powell & Stevens, JJ.)); that "it is thus important to look at the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." *Coker*, 433 U.S. at 596 (White, Stewart, Blackmun & Stevens, JJ.). In *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976), a plurality consisting of Justices Stewart, Powell and Stevens cited jury refusal to convict in mandatory capital cases to support its conclusion that the mandatory statutes did not reflect evolving standards of decency. In *Lockett v. Ohio*, 438 U.S. 586, 625 (1978), Justice White wrote, in concurrence, that the death penalty could not be used if the defendant did not intend the death of the victim, even though at the time "approximately half of the states [had] not legislatively foreclosed the possibility of imposing the death penalty upon those who did not intend to cause death"; the reasoning of Justice White's concurrence in *Lockett* was endorsed by the Court in *Enmund v. Florida*, with both the majority, see 458 U.S. at 795, and the dissent, see *id.* at 818-20 (O'Connor, J., joined by Burger, C.J., Powell & Rehnquist, JJ.), analyzing the behavior of capital juries. The majority in *Enmund* relied on statistics showing that despite these statutes, defendants in this category rarely were executed. Justice Brennan, in *Furman*, also relied on the gap between legislative authorization of capital punishment and the number of death penalties actually inflicted:

When an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted — save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it.

Furman v. Georgia, 408 U.S. 238, 300 (1972) (Brennan, J., concurring). In *Coker v. Georgia*, 433 U.S. at 596, a plurality consisting of Justices Stewart, White, Blackmun and Stevens cited *Gregg's* observation that the "jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved." Justice Powell concurred in this reasoning insofar as it supported "the view that ordinarily death is a disproportionate punishment for the crime of raping an adult woman." *Coker*, 433 U.S. at 601.

Thus, the Court, while considering legislative judgments as one measure of society's evolving standards of decency, still looks beyond those judgments to learn whether they are accurate. There is a good reason to do so:

Each lawmaker confronts capital punishment abstractly. No life depends on her vote. Legislative response tells us the degree to which we are willing to have laws permitting execution, but sentencing and execution tell us the degree to which we are willing to carry them out. A statute, furthermore, is static. It remains until changed. As public opinion shifts, older statutes become less reliable indicators of current values. Forces influence legislators that do not affect jurors. A legislator may believe, for example, that death penalty proponents in his constituency are more likely than its opponents to be single-issue voters or are more likely to organize against him, if he opposes capital punishment, than will opponents if he supports it. A constituency's willingness to vote based on a single issue and its degree of organization likely influence a lawmaker's decision and may skew the degree to which the pattern of legislation reflects community sentiment. Of course, legislative action may accurately reflect community sentiment on the acceptability of the death penalty, either generally or in classes of cases. But without a pattern of jury response, we cannot know whether this is true or whether, instead, various political factors have combined to obscure the community view. The jury, "because it is so directly involved," is needed to avoid guessing wrong.

Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 72-73 (1980) (footnotes omitted).

It is no accident that even in an era in which the public perceives a significant increase in juvenile crime, juries almost never vote to execute teenagers. Lay jurors, given the task of expressing the common sense judgment of the community, recognize that adolescents are developmentally distinct from adults, that adolescents grow up,

and that young people are uniquely rehabilitable. Juries recognize that it is unrealistic and inhumane to treat young offenders as if they have fully mature judgment and control.

Or perhaps juries intuit that the philosophical premises of retribution fail when applied to minors. The morality of the anger that fuels the desire for retribution is based on the killer's violation of the social compact. Society has entrusted its citizens with rights, one of which is freedom, and the murderer has grossly abused that freedom. W. Berns, *For Capital Punishment* 155 (1979). The fallacy of this retributive argument as it applies to minors is precisely that we do *not* entrust minors with such freedom.³⁵ As discussed above, states do not trust their minors to vote, sit on juries or engage in a wide variety of adult activities.

The inequity of the death penalty for minors is perhaps best captured by a vignette described in S. Gettinger, *Sentenced to Die* (1979). The mother of a condemned 15-year-old was asked by prison officials for parental consent to emergency treatment for her son, should he need it. The mother observed: "Now, isn't that ironic? . . . He's old enough to be put to death, but he's not old enough to get an aspirin without our consent." *Id.* at 150.

³⁵ John Stuart Mill's *On Liberty* set forth, in 1859, the classic antipaternalist position. J.S. Mill, *On Liberty* (Penguin Classics 2d ed. 1986). Mill's logic is utilitarian and argues for the absolute prohibition of state paternalism. Yet Mill found it "hardly necessary to say that [his] doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood." *Id.* at 69.

CONCLUSION

The Court should hold that execution of those who were younger than age 18 at the time of their offense violates the eighth and fourteenth amendments.

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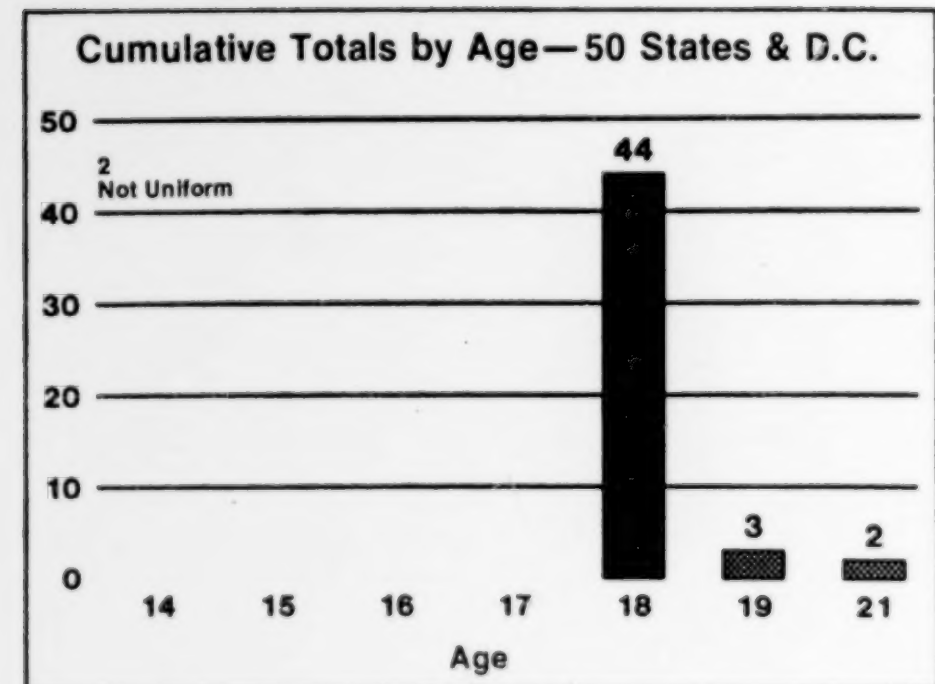
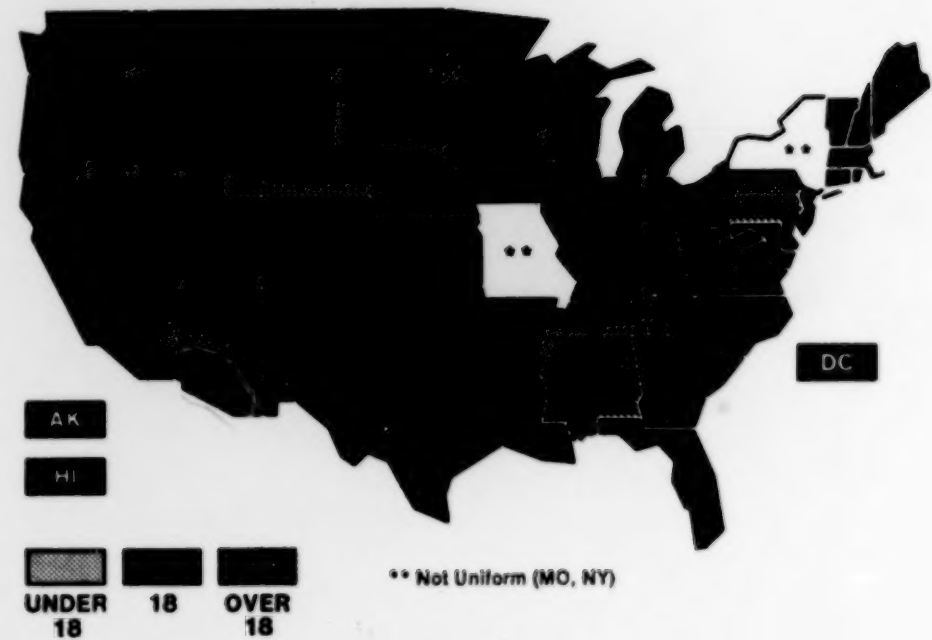
Date: May 14, 1987

APPENDICES

1a

APPENDIX A

Age of Majority



AGE OF MAJORITY *

State	Age	Citation
AL	19	Ala. Code § 26-1-1 (1986)
AK	18	Alaska Stat. § 25.20.010 (1983)
AZ	18	Ariz. Rev. Stat. Ann. § 1-215 (1974)
AR	18	Ark. Stat. Ann. § 57-103 (1985)
CA	18	Cal. Civil Code § 25.1 (West 1982)
CO	18	Colo. Rev. Stat. § 13-22-101 (1974)
CT	18	Conn. Gen. Stat. § 1-1d (Supp. 1986)
DL	18	Del. Code Ann. tit. 1, § 701 (1975)
DC	18	D.C. Code Ann. § 30-401 (1981)
FL	18	Fla. Stat. Ann. § 743.07 (West 1986)
GA	18	Ga. Code Ann. § 39-1-1 (1982)
HI	18	Haw. Rev. Stat. § 577-1 (1976)
ID	18	Idaho Code § 32-101 (1983)
IL	18	Ill. Ann. Stat. ch. 110½ para. 11-1 (Smith-Hurd Supp. 1986)
IN	18	Ind. Code Ann. § 34-1-67-1 (Burns Supp. 1980)
IA	18	Iowa Code Ann. § 599.1 (West 1981)
KS	18	Kan. Stat. Ann. § 38-101 (1986)
KY	18	Ky. Rev. Stat. Ann. § 2.015 (Michie/Bobbs-Merrill 1985)
LA	18	La. Civ. Code Ann. art. 37 (West 1987)
ME	18	Me. Rev. Stat. Ann. tit. 1, § 72 (1979)
MD	18	Md. Ann. Code art. 1, § 24 (1981)
MA	18	Mass. Gen. Laws Ann. ch. 4, § 7 Cl. fifty-first (West 1986)
MI	18	Mich. Comp. Laws Ann. § 722.52 (West Supp. 1986)
MN	18	Minn. Stat. Ann. § 645.451 (West Supp. 1987)
MS	21	Miss. Code Ann. § 1-3-27 (1972)
MO	—	Not Uniform
MT	18	Mont. Code Ann. § 41-1-101 (1985)
NE	19	Neb. Rev. Stat. § 38-101 (1984)

* Counsel gratefully acknowledges the valuable assistance of Janice Mitnick, Margaret McCandless, Stephan Geisler, Robert Taylor, Michael Ollen, Jonathan Graves and James Lee Buck in the preparation of the Appendices to this brief.

State	Age	Citation
NV	18	Nev. Rev. Stat. § 129.010 (1957)
NH	18	N.H. Rev. Stat. Ann. 21:44 (1985)
NJ	18	N.J. Stat. Ann. § 9:17 B-3 (West 1976)
NM	18	N.M. Stat. Ann. § 28-6-1 (1983)
NY	—	Not Uniform
NC	18	N.C. Gen. Stat. § 48A-2 (1984)
ND	18	N.D. Cent. Code § 14-10-01 (1981)
OH	18	Ohio Rev. Code Ann. § 3109.01 (Baldwin 1983)
OK	18	Okla. Stat. Ann. tit. 15, § 13 (West 1983)
OR	18	Or. Rev. Stat. § 109-510 (1985)
PA	21	Pa. Stat. Ann. tit. 1-6, § 1991 (Purdon 1986)
RI	18	R.I. Gen. Laws § 15-12-1 (1981)
SC	18	S.C. Const. art. XVII, § 14
SD	18	S.D. Codified Laws Ann. § 26-1-1 (1984)
TN	18	Tenn. Code Ann. § 1-3-105 (1985)
TX	18	Tex. Fam. Code Ann. § 11.01 (1) (Vernon 1986)
UT	18	Utah Code Ann. § 15-2-1 (1986)
VT	18	Vt. Stat. Ann. tit. 1, § 173 (1985)
VA	18	Va. Code Ann. § 1-13.42 (1979)
WA	18	Wash. Rev. Code Ann. § 26.28.010 (1986)
WV	18	W. Va. Code § 2-2-10 (1979)
WI	18	Wis. Stat. Ann. § 990.01 (West 1985)
WY	19	Wyo. Stat. § 14-1-101 (1986)

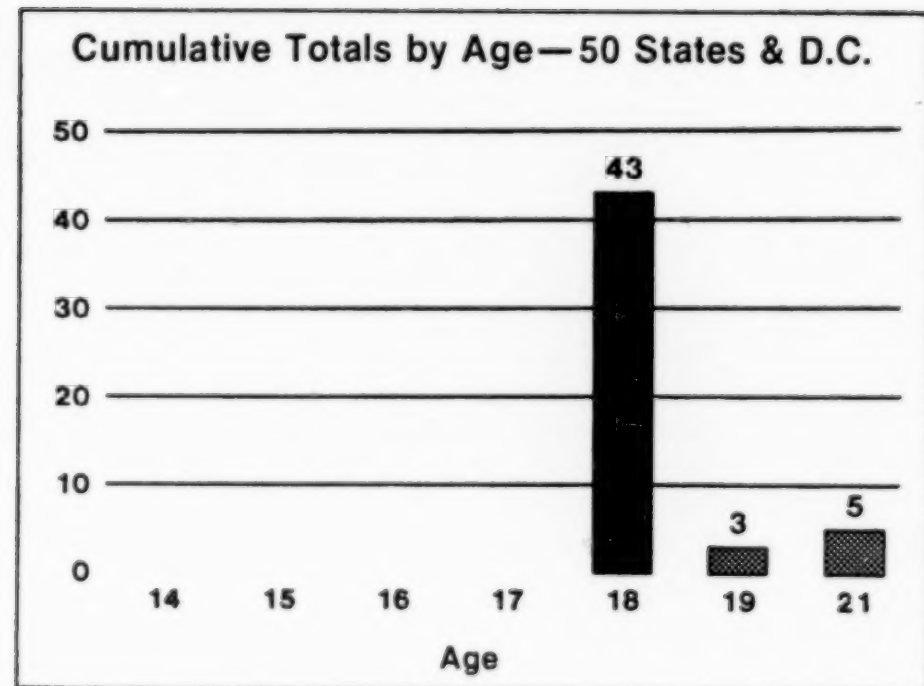
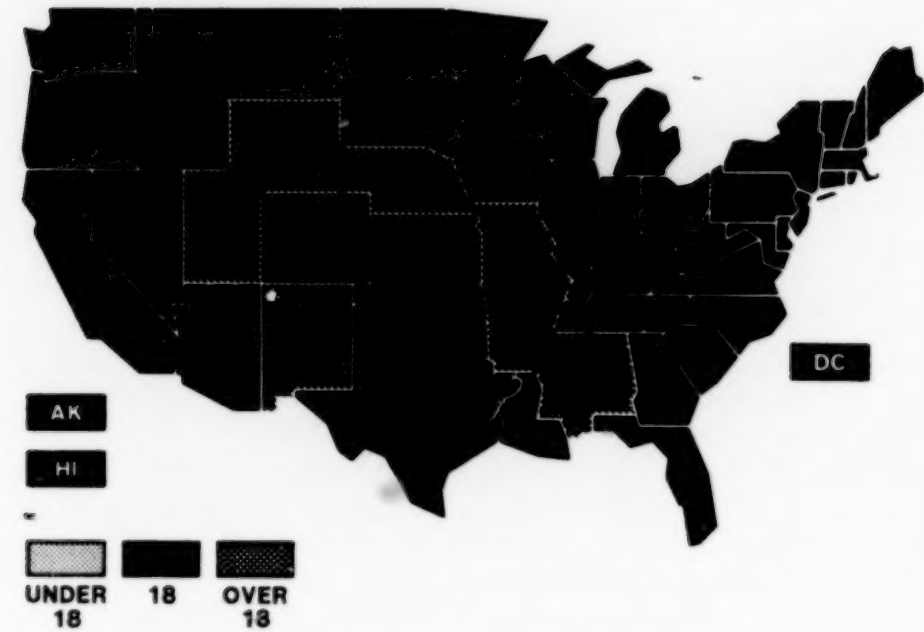
Totals (50 States and D.C.)

	Not			
Age	18	19	21	Uniform
Number	44	3	2	2

1b

APPENDIX B

Right to Serve on Jury



RIGHT TO SERVE ON JURY

State	Age	Citation
AL	19	Ala. Code § 12-16-60 (1986)
AK	18	Alaska Stat. § 09.20.010 (1983)
AZ	18	Ariz. Rev. Stat. Ann. § 21-301 (1975)
AR	21	Ark. Stat. Ann. § 39-101 (Supp. 1985)
CA	18	Cal. Civ. Proc. § 198 (West 1982)
CO	18	Colo. Rev. Stat. § 13-71-106 (Supp. 1986)
CT	18	Conn. Gen. Stat. § 51-217 (1985)
DL	18	Del. Code Ann. tit. 10, § 4504 (Supp. 1984)
DC	18	D.C. Code Ann. § 11-1901 (1981)
FL	18	Fla. Stat. Ann. § 40.01 (West Supp. 1987)
GA	18	Ga. Code Ann. § 15-12-60 (1985)
HI	18	Haw. Rev. Stat. § 612-4 (1976)
ID	18	Idaho Code § 2-209 (Supp. 1986)
IL	18	Ill. Stat. Ann. ch. 78, para. 2 (Smith-Hurd 1987)
IN	18	Ind. Code Ann. § 35-1-15-11 (Burns 1979)
IA	18	Iowa Code Ann. § 607.2 (West Supp. 1986)
KS	18	Kan. Stat. Ann. § 43-156 (1986)
KY	18	Ky. Rev. Stat. Ann. § 29A.080 (Michie/Bobbs-Merrill 1985)
LA	18	La. Code Crim. Proc. Ann. art. 401 (West 1987)
ME	18	Me. Rev. Stat. Ann. tit. 14, § 1211 (Supp. 1986)
MD	18	Md. Cts. & Jud. Proc. Code Ann. § 8-104 (1984)
MA	18	Mass. Gen. Laws Ann. ch. 234, § 1 (West 1986); ch. 51, § 1 (West 1975)
MI	18	Mich. Comp. Laws Ann. § 600.1304 (West 1981)
MN	18	Minn. Stat. Ann. § 593.41 (West 1987)
MS	21	Miss. Code Ann. § 13-5-1 (1972)
MO	21	Mo. Stat. Ann. § 494.010 (Vernon Supp. 1987)
MT	18	Mont. Code Ann. § 3-15-301 (1985)
NE	19	Neb. Rev. Stat. § 25-1601 (1985)
NV	18	Nev. Rev. Stat. § 6.010 (1957)
NH	18	N.H. Rev. Stat. Ann. §§ 500-A:1 to 500-A:2 (1983)

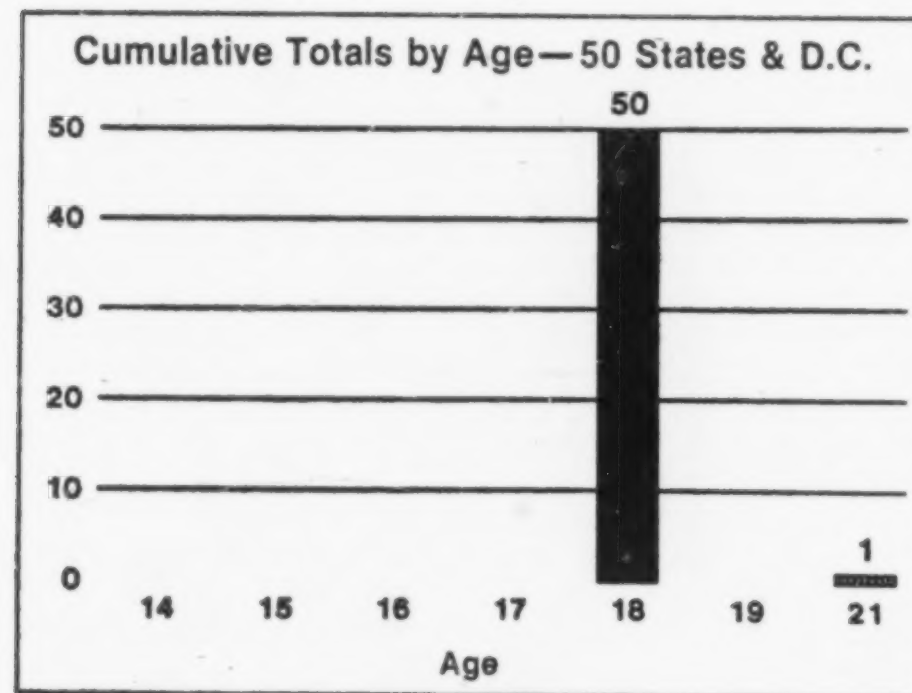
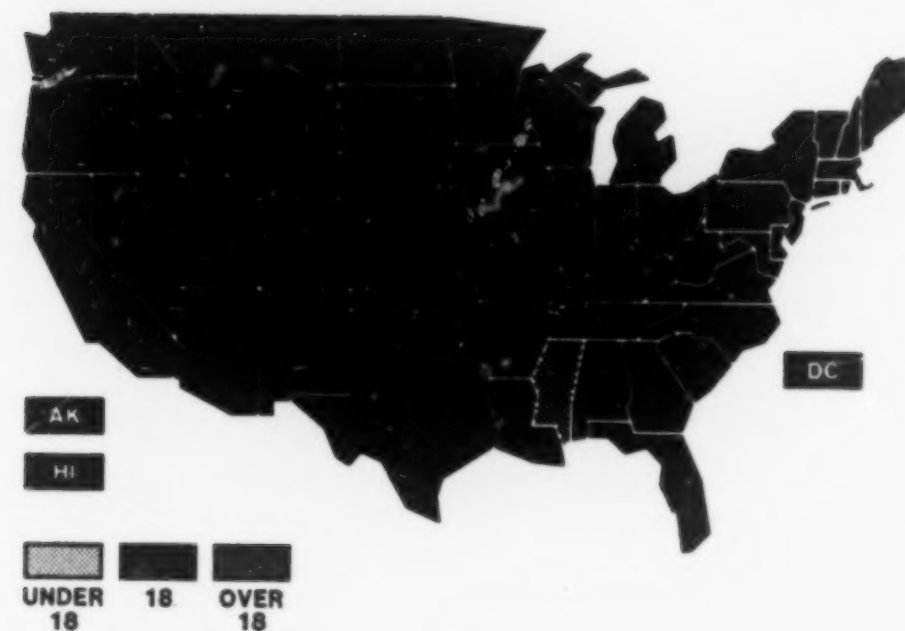
State	Age	Citation
NJ	18	N.J. Stat. Ann. § 9-17B-1 (West Supp. 1986)
NM	21	N.M. Stat. Ann. § 38-5-1 (1978)
NY	18	N.Y. Jud. Law § 510 (McKinney Supp. 1987)
NC	18	N.C. Gen. Stat. § 9-3 (1986)
ND	18	N.D. Cent. Code § 27-09.1-08 (Supp. 1985)
OH	18	Ohio Rev. Code Ann. § 2313.42 (Baldwin 1984)
OK	18	Okla. Stat. Ann. tit. 38, § 28 (West Supp. 1987)
OR	18	Or. Rev. Stat. § 10.030(c) (1985)
PA	18	Pa. Stat. Ann. tit. 42, § 4521 (Purdon 1981)
RI	18	R.I. Gen. Laws § 9-9-1 (Supp. 1984)
SC	18	S.C. Code Ann. § 14-7-140 (Law. Co-op. Supp. 1986)
SD	18	S.D. Codified Laws Ann. § 16-13-10 (1986)
TN	18	Tenn. Code Ann. § 22-1-101 (1980)
TX	18	Tex. Gov't Code Ann. § 62.102 (Vernon 1987)
UT	21	Utah Code Ann. § 78-46-8 (1977)
VT	18	Vt. Stat. Ann.—Administrative Orders and Rules: Qualification List, Selection and Summoning of All Jurors—Rule 25 (1986)
VA	18	Va. Code Ann. § 8.01-337 (1984)
WA	18	Wash. Rev. Code Ann. § 2.36.070 (Supp. 1987)
WV	18	W. Va. Code § 52-1-8 (Supp. 1986)
WI	18	Wis. Stat. Ann. § 756.01 (West 1981)
WY	19	Wyo. Stat. § 1-11-101 (West Supp. 1986)

Totals (50 States and D.C.)

Age	18	19	21
Number	43	3	5

APPENDIX C

Right to Marry Without Parental Consent



RIGHT TO MARRY WITHOUT PARENTAL CONSENT

State	Age	Citation
AL	18	Ala. Code § 30-1-5 (1983)
AK	18	Alaska Stat. § 25.05.171 (1983)
AZ	18	Ariz. Rev. Stat. Ann. § 25-102 (1976)
AR	18	Ark. Stat. Ann. § 55-102 (Supp. 1985)
CA	18	Cal. Civ. Code § 4101 (West 1983)
CO	18	Colo. Rev. Stat. § 14-2-106 (Supp. 1986)
CT	18	Conn. Gen. Stat. § 46b-30 (1986)
DL	18	Del. Code Ann. tit. 13, § 123 (1981)
DC	18	D.C. Code Ann. § 30-111 (1981)
FL	18	Fla. Stat. Ann. § 741.04 (1986)
GA	18	Ga. Code Ann. § 19-3-37 (1982)
HI	18	Haw. Rev. Stat. § 572-2 (1976)
ID	18	Idaho Code § 32-202 (1963)
IL	18	Ill. Ann. Stat. ch. 40, para. 203 (Smith-Hurd Supp. 1986)
IN	18	Ind. Code Ann. § 31-7-1-6 (Burns Supp. 1986)
IA	18	Iowa Code Ann. § 595.2 (West 1981)
KS	18	Kan. Stat. Ann. § 23-106 (1981)
KY	18	Ky. Rev. Stat. Ann. § 402.210 (Michie/Bobbs-Merrill 1984)
LA	18	La. Civ. Code Ann. art. 97 (West 1952)
ME	18	Me. Rev. Stat. Ann. tit. 19, § 62 (1981)
MD	18	Md. Fam. Law Code Ann. § 2-301 (1984)
MA	18	Mass. Gen. Laws Ann. ch. 207, § 7 (West Supp. 1986)
MI	18	Mich. Comp. Laws Ann. § 551.103 (West Supp. 1986)
MN	18	Minn. Stat. Ann. § 517.02 (West Supp. 1987)
MS	21	Miss. Code Ann. § 93-1-5(d) (Supp. 1986)
MO	18	Mo. Ann. Stat. § 451.090 (Vernon 1986)
MT	18	Mont. Code Ann. § 40-1-202 (1985)
NE	18	Neb. Rev. Stat. § 42-105 (1984)
NV	18	Nev. Rev. Stat. § 122.020 (1957)
NH	18	N.H. Rev. Stat. Ann. § 457:5 (1983)
NJ	18	N.J. Stat. Ann. § 9:17 B-1 (West Supp. 1986)
NM	18	N.M. Stat. Ann. § 40-1-6 (1986)
NY	18	N.Y. Dom. Rel. Law § 15 (McKinney Supp. 1987)

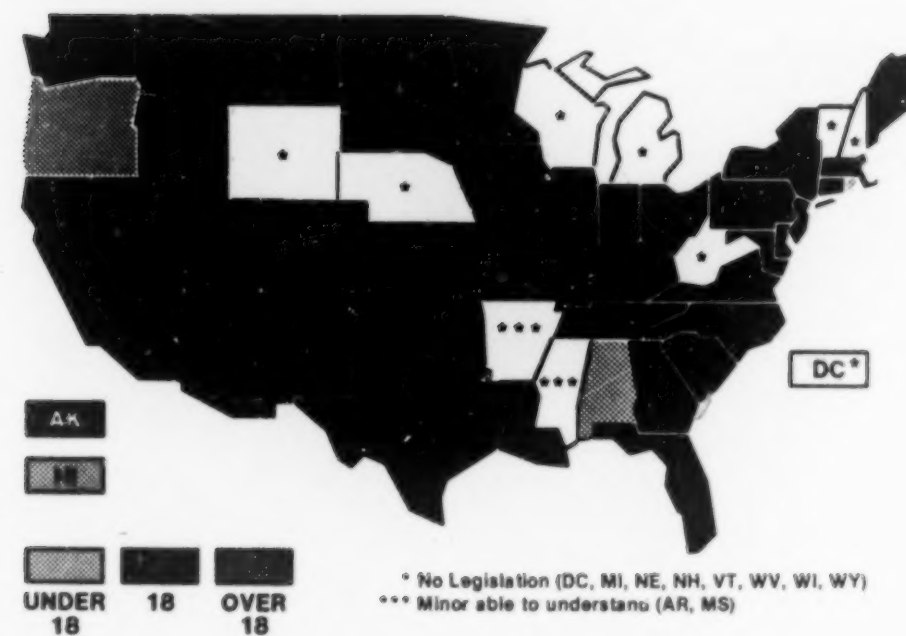
State	Age	Citation
NC	18	N.C. Gen. Stat. § 51-2 (1984)
ND	18	N.D. Cent. Code § 14-03-02 (1981)
OH	18	Ohio Rev. Code Ann. § 3101.01 (Baldwin 1983)
OK	18	Okla. Stat. Ann. tit. 43, § 3 (West 1979)
OR	18	Or. Rev. Stat. § 106.060 (1985)
PA	18	Pa. Stat. Ann. tit. 48, § 1-5 (Purdon Supp. 1986)
RI	18	R.I. Gen. Laws § 15-2-11 (1981)
SC	18	S.C. Code Ann. § 20-1-250 (Law. Co-op. 1985)
SD	18	S.D. Codified Laws Ann. § 25-1-9 (1984)
TN	18	Tenn. Code Ann. § 36-3-106 (1984)
TX	18	Tex. Fam. Code Ann. § 1.51 (Vernon 1987)
UT	18	Utah Code Ann. § 30-1-9 (1984)
VT	18	Vt. Stat. Ann. tit. 18, § 5142 (Supp. 1986)
VA	18	Va. Code Ann. § 20-49 (1983)
WA	18	Wash. Rev. Code Ann. § 26.04.210 (1986)
WV	18	W. Va. Code § 48-1-1 (1986)
WI	18	Wis. Stat. Ann. § 765.02 (West 1981)
WY	18	Wyo. Stat. § 20-1-102 (1977)

Totals (50 States and D.C.)

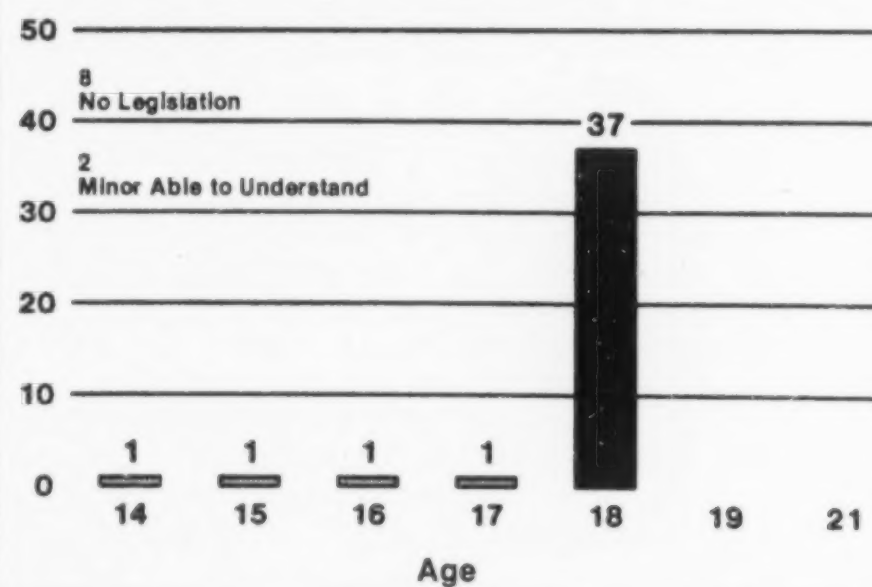
	Age	18	21
Number	50	1	

APPENDIX D

Consent to All Forms of Medical Treatment



Cumulative Totals by Age—50 States & D.C.



CONSENT TO ALL FORMS OF MEDICAL TREATMENT

State	Age	Citation
AL	14	Ala. Code § 22-8-4 (1984)
AK	18	Alaska Stat. § 09.65.100 (1983)
AZ	18	Ariz. Rev. Stat. Ann. § 44-132 (1967)
AR	*	Ark. Stat. Ann. § 82-363 (Supp. 1986)
CA	18	Cal. Civ. Code § 25.8 (West 1982)
CO	18	Colo. Rev. Stat. § 13-22-103 (Supp. 1986)
CT	18	Conn. Gen. Stat. Ann. § 46b-150d (1986)
DL	18	Del. Code Ann. tit. 13, § 707 (1981)
DC	—	No Legislation
FL	18	Fla. Stat. Ann. § 743.064 (West 1986)
GA	18	Ga. Code Ann. § 31-9-2 (1985)
HI	17	Haw. Rev. Stat. § 577A-2 (1976)
ID	18	Idaho Code § 39-3801 (1985)
IL	18	Ill. Ann. Stat. ch. 111, para. 4501 (Smith-Hurd 1978)
IN	18	Ind. Code Ann. § 16-8-3-1 (Burns 1973)
IA	18	Iowa Code Ann. § 147.137 (West Supp. 1986)
KS	18	Kan. Stat. Ann. § 38-122 (1986)
KY	18	Ky. Rev. Stat. Ann. § 216B.400 (Michie/Bobbs-Merrill 1982)
LA	18	La. Rev. Stat. Ann. § 40:1095 (West 1977)
ME	18	Me. Rev. Stat. Ann. tit. 32, § 3292 (Supp. 1986)
MD	18	Md. Health-Gen. Code Ann. § 20-102 (1982)
MA	18	Mass. Gen. Laws Ann. ch. 112, § 12F (West 1983)
MI	—	No Legislation
MN	18	Minn. Stat. Ann. § 144.341 (West 1987)
MS	*	Miss. Code Ann. § 41-41-3 (Supp. 1986)
MO	18	Mo. Ann. Stat. § 431.061 (Vernon Supp. 1987)
MT	18	Mont. Code Ann. § 41-1-402 (1985)
NE	—	No Legislation
NV	18	Nev. Rev. Stat. § 129-030 (1957)
NH	—	No Legislation
NJ	18	N.J. Stat. Ann. § 9:17B-1 (West Supp. 1986)
NM	18	N.M. Stat. Ann. § 24-10-1 (1986)

* Minor able to understand

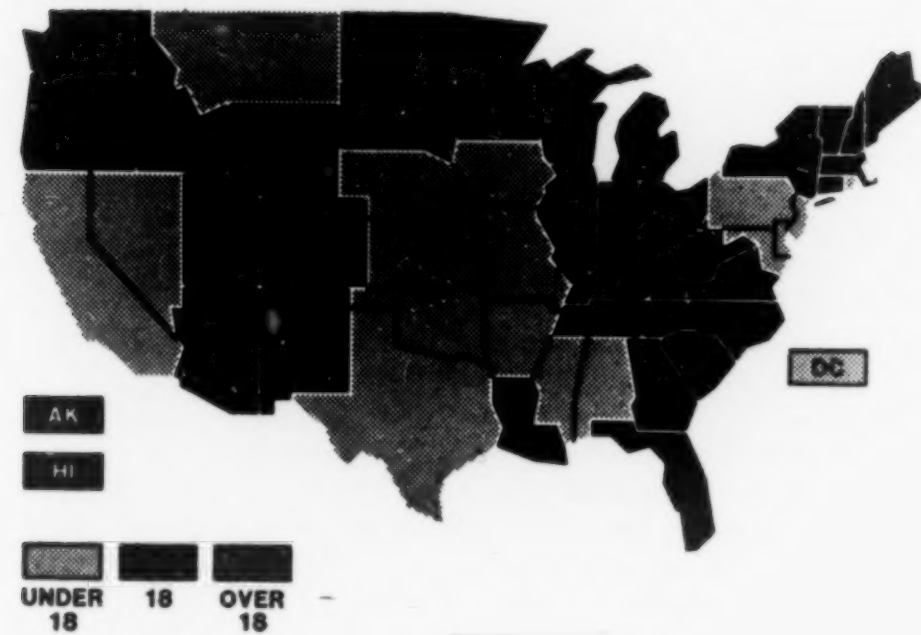
State	Age	Citation
NY	18	N.Y. Pub. Health Law § 2504 (McKinney 1985)
NC	18	N.C. Gen. Stat. § 90-21.1 (1985)
ND	18	N.D. Cent. Code § 14-10-17.1 (1981)
OH	18	Ohio Rev. Code Ann. § 2317.54 (Baldwin 1984)
OK	18	Okla. Stat. Ann. tit. 63, § 2602 (West 1984)
OR	15	Or. Rev. Stat. § 109.640 (1985)
PA	18	Pa. Stat. Ann. tit. 35, § 10101 (Purdon 1977)
RI	16	R.I. Gen. Laws § 23-4.6-1 (1985)
SC	18	S.C. Code Ann. § 20-7-280 (Law. Co-op. 1985)
SD	18	S.D. Codified Laws Ann. § 20-9-4.2 (Supp. 1986)
TN	18	Tenn. Code Ann. §§ 63-6-220 to 63-6-223 (1985)
TX	18	Tex. Fam. Code Ann. § 35.03 (1986)
UT	18	Utah Code Ann. § 78-14-5 (1977)
VT	—	No Legislation
VA	18	Va. Code Ann. § 54-325.2 (1982)
WA	18	Wash. Rev. Code Ann. § 26.28.015 (1986)
WV	—	No Legislation
WI	—	No Legislation
WY	—	No Legislation

Totals (50 States and D.C.)

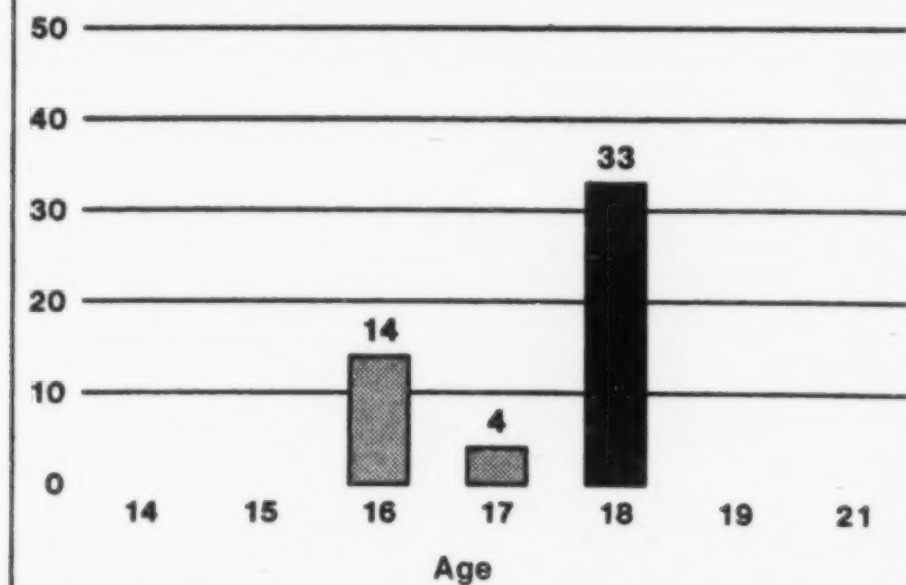
						Minor Able to Understand	No Legislation
Age	14	15	16	17	18		
Number	1	1	1	1	37	2	8

APPENDIX E

Driving Without Parental Consent



Cumulative Totals by Age—50 States & D.C.



DRIVING WITHOUT PARENTAL CONSENT

State	Age	Citation
AL	16	Ala. Code § 32-6-7 (1983)
AK	18	Alaska Stat. § 28.15.071 (1984)
AZ	18	Ariz. Rev. Stat. Ann. § 28-417 (1976)
AR	16	Ark. Stat. Ann. § 75-309 (1979)
CA	16	Cal. Veh. Code § 12507 (West Supp. 1987)
CO	18	Colo. Rev. Stat. § 42-2-107 (1984)
CT	18	Conn. Gen. Stat. § 14-36 (Supp. 1986)
DL	16	Del. Code Ann. tit. 21, § 2707 (Supp. 1984)
DC	16	D.C. Code Ann. § 40-301 (1981)
FL	18	Fla. Stat. Ann. § 322.09 (West Supp. 1987)
GA	18	Ga. Code Ann. § 40-5-26 (1985)
HI	18	Haw. Rev. Stat. § 286.112 (1985)
ID	18	Idaho Code § 49-313 (1980)
IL	18	Ill. Ann. Stat. ch. 95½, para. 6-103 (Smith-Hurd Supp. 1986)
IN	18	Ind. Code Ann. § 9-1-4-32 (Burns 1980)
IA	16	Iowa Code Ann. § 321.177 (West Supp. 1986)
KS	16	Kan. Stat. Ann. § 8-237 (1982)
KY	18	Ky. Rev. Stat. Ann. § 186.470 (Michie/Bobbs-Merrill Supp. 1986)
LA	18	La. Rev. Stat. Ann. § 32:407 (West Supp. 1987)
ME	18	Me. Rev. Stat. Ann. tit. 29, § 585 (Supp. 1986)
MD	16	Md. Transp. Code Ann. § 16-103 (1984)
MA	18	Mass. Gen. Laws Ann. ch. 90, § 8 (West Supp. 1986)
MI	18	Mich. Comp. Laws Ann. § 257.308 (West Supp. 1986)
MN	18	Minn. Stat. Ann. § 171.04 (West 1986)
MS	17	Miss. Code Ann. § 63-1-23 (Supp. 1986)
MO	16	Mo. Ann. Stat. § 302.060 (Vernon Supp. 1987)
MT	16	Mont. Code Ann. § 61-5-105 (1985)
NE	16	Neb. Rev. Stat. § 60-407 (1984)
NV	16	Nev. Rev. Stat. § 483.250 (1983)
NH	18	N.H. Rev. Stat. Ann. § 263:17 (1982)
NJ	17	N.J. Stat. Ann. § 39:3-10 (West 1973)
NM	18	N.M. Stat. Ann. § 66-5-11 (1984)
NY	18	N.Y. Veh. & Traf. Law § 502 (McKinney 1986)

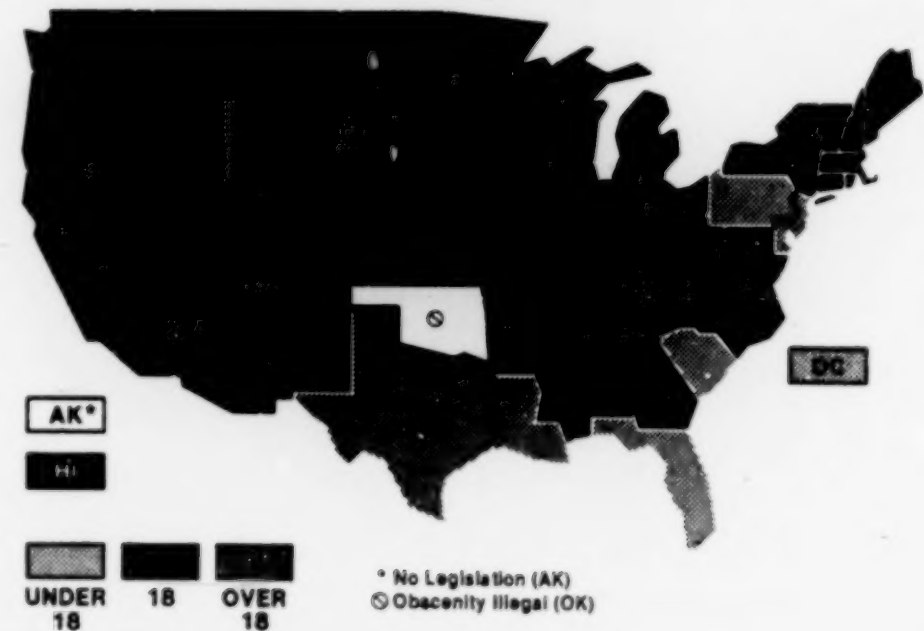
State	Age	Citation
NC	18	N.C. Gen. Stat. § 20-11 (1983)
ND	18	N.D. Cent. Code § 39-06-08 (1981)
OH	18	Ohio Rev. Code Ann. § 4507.07 (Baldwin 1983)
OK	16	Okla. Stat. Ann. tit. 47, § 6-107 (West Supp. 1987)
OR	18	Or. Rev. Stat. § 807.060 (1985)
PA	17	Pa. Stat. Ann. tit. 75, § 1503 (Purdon 1977)
RI	16	R.I. Gen. Laws § 31-10-3 (Supp. 1986)
SC	18	S.C. Code Ann. § 56-1-100 (Law. Co-op. 1977)
SD	18	S.D. Codified Laws Ann. § 32-12-6 (1984)
TN	18	Tenn. Code Ann. § 55-7-104 (1980)
TX	17	Tex. Rev. Civ. Stat. Ann. art. 6687(b) (4) (Vernon Supp. 1987)
UT	18	Utah Code Ann. § 41-2-10 (1981)
VT	18	Vt. Stat. Ann. tit. 23, § 607 (1978)
VA	18	Va. Code Ann. § 46.1-357 (Supp. 1985)
WA	18	Wash. Rev. Code Ann. § 46.20-100 (Supp. 1987)
WV	18	W. Va. Code § 17B-2-3 (1986)
WI	18	Wis. Stat. Ann. § 343.15 (West 1986)
WY	18	Wyo. Stat. § 31-7-112 (Supp. 1986)

Totals (50 States and D.C.)

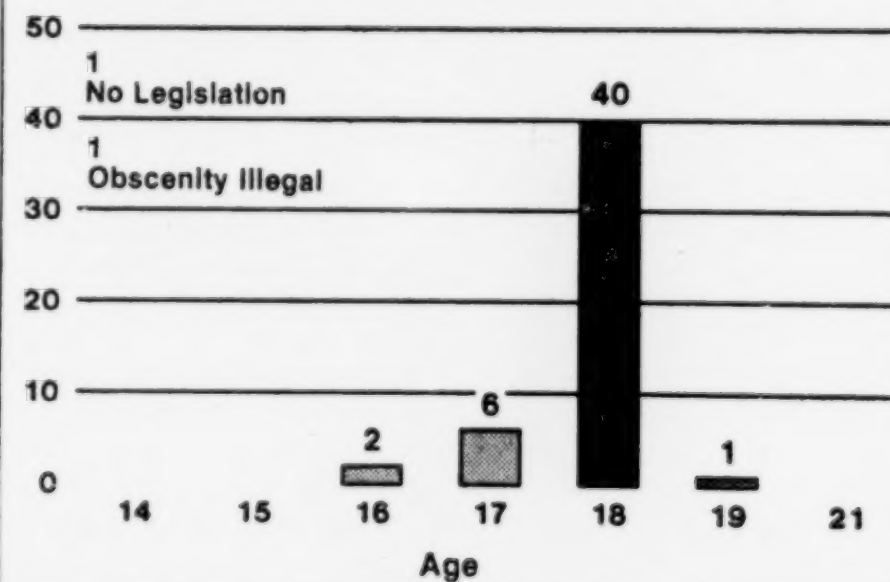
Age	16	17	18
Number	14	4	33

APPENDIX F

Right to Purchase Pornographic Materials



Cumulative Totals by Age—50 States & D.C.



RIGHT TO PURCHASE PORNOGRAPHIC MATERIALS

State	Age	Citation
AL	18	Ala. Code § 13A-12-170 (1982)
AK	—	No Legislation
AZ	18	Ariz. Rev. Stat. Ann. § 13-3506 (1978)
AR	18	Ark. Stat. Ann. § 41-3582 (1977)
CA	18	Cal. Penal Code § 313.1 (West Supp. 1987)
CO	18	Colo. Rev. Stat. §§ 18-7-501 to 18-7-502 (1986)
CT	18	Conn. Gen. Stat. § 53a-196 (1985)
DL	17	Del. Code Ann. tit. 11, § 1361 (Supp. 1984)
DC	17	D.C. Code Ann. § 22-2001 (1981)
FL	17	Fla. Stat. Ann. § 847.012 (West Supp. 1987)
GA	18	Ga. Code Ann. § 16-12-103 (1984)
HI	18	Haw. Rev. Stat. § 712-1215 (1976)
ID	18	Idaho Code § 18-1513 (1979)
IL	18	Ill. Ann. Stat. ch. 38, para. 11-21 (Smith-Hurd 1979)
IN	18	Ind. Code Ann. § 35-30-11.1-1 (Burns 1979)
IA	18	Iowa Code Ann. § 728.2 (West 1979)
KS	18	Kan. Stat. Ann. § 21-4301a (1986)
KY	18	Ky. Rev. Stat. Ann. § 531-030 (Michie/Bobbs-Merrill 1985)
LA	17	La. Rev. Stat. Ann. § 14:91.11 (West 1986)
ME	18	Me. Rev. Stat. Ann. tit. 17, § 2911 (Supp. 1986)
MD	18	Md. Ann. Code art. 27, § 419 (Supp. 1985)
MA	18	Mass. Gen. Laws Ann. ch. 272, § 28 (West 1979)
MI	18	Mich. Comp. Laws Ann. § 750.142 (West Supp. 1986)
MN	18	Minn. Stat. Ann. § 617.293 (West 1987)
MS	18	Miss. Code Ann. § 97-5-27 (Supp. 1986)
MO	18	Mo. Ann. Stat. § 573.040 (Vernon 1979)
MT	18	Mont. Code Ann. § 45-8-201 (1985)
NE	18	Neb. Rev. Stat. § 28-808 (1985)
NV	18	Nev. Rev. Stat. Ann. § 201.265 (Michie 1957)
NH	18	N.H. Rev. Stat. Ann. § 571-B:2 (1986)
NJ	16	N.J. Stat. Ann. § 2C:24-4 (West 1982)
NM	18	N.M. Stat. Ann. §§ 30-37-1 to 30-37-2 (1984)
NY	18	N.Y. Penal Law § 235.21 (McKinney 1980)

State	Age	Citation
NC	18	N.C. Gen. Stat. § 19-12 (1983)
ND	18	N.D. Cent. Code § 12.1-27.1-03 (1985)
OH	18	Ohio Rev. Code Ann. § 2907.31 (Baldwin 1986)
OK	—	Okla. Stat. Ann. tit. 21, § 1040.8 (West Supp. 1987) [Obscenity Illegal]
OR	18	Or. Rev. Stat. §§ 167.060 <i>et seq.</i> (1983)
PA	17	Pa. Stat. Ann. tit. 18, § 5903 (Purdon 1983)
RI	18	R.I. Gen. Laws § 11-31-10 (1981)
SC	16	S.C. Code Ann. § 16-15-370 (Law. Co-op. 1977)
SD	18	S.D. Codified Laws Ann. § 22-24-28 (1979)
TN	18	Tenn. Code Ann. §§ 39-6-1131 to 39-6-1132 (1982)
TX	17	Tex. Penal Code Ann. § 43.24 (Vernon 1974)
UT	18	Utah Code Ann. § 76-10-1206 (1978)
VT	18	Vt. Stat. Ann. tit. 13, §§ 2801 to 2802 (1974)
VA	18	Va. Code Ann. § 18.2-391 (1982)
WA	18	Wash. Rev. Code Ann. §§ 9.68.050 to 9.68.060 (1977)
WV	18	W. Va. Code §§ 61-8A-1 to 61-8A-2 (1984)
WI	18	Wis. Stat. Ann. § 944.21 (West 1982)
WY	19	Wyo. Stat. § 6-4-302 (1983) and § 8-1-102 (1986)

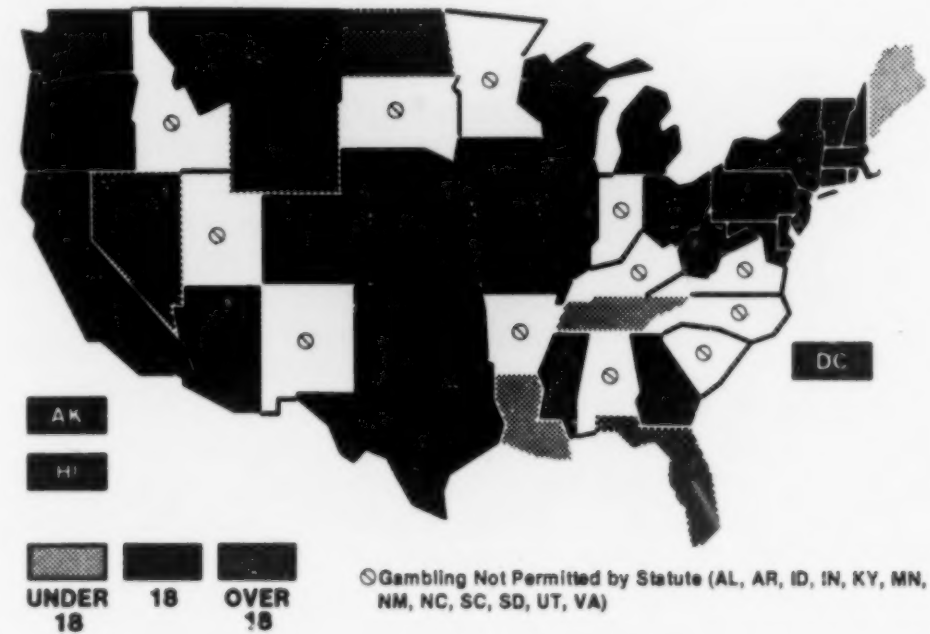
Totals (50 States and D.C.)

	Age	16	17	18	19	Obscenity Illegal	No Legislation
Number		2	6	40	1	1	1

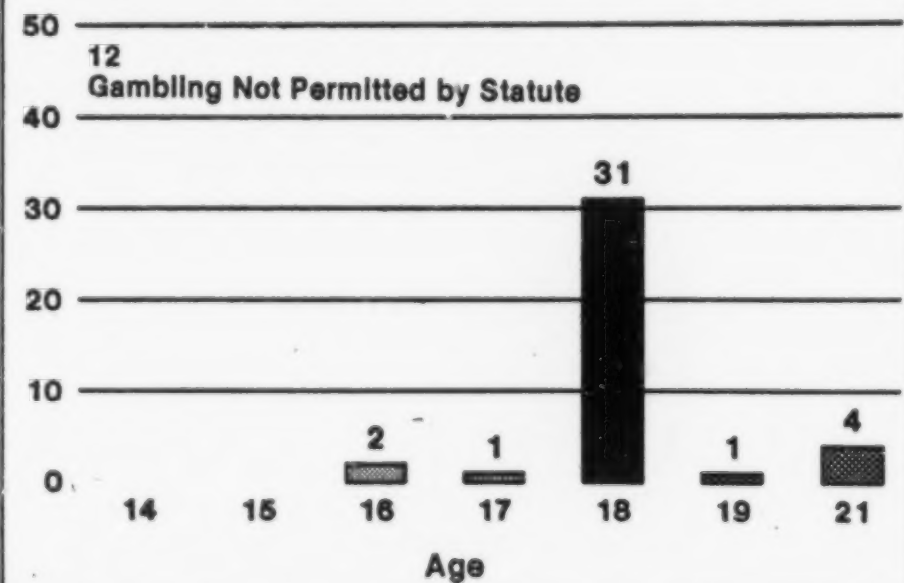
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APPENDIX G

Right to Participate in Legalized Gambling



Cumulative Totals by Age—50 States & D.C.



RIGHT TO PARTICIPATE IN LEGALIZED GAMBLING

State	Age	Citation
AL	—	Gambling Not Permitted by Statute
AK	18	Alaska Stat. § 43.35.040 (1983)
AZ	18	Ariz. Rev. Stat. Ann. § 5-112 (1974)
AR	—	Gambling Not Permitted by Statute
CA	18	Cal. Penal Code § 326.5 (West Supp. 1987)
CO	18	Colo. Rev. Stat. § 24-35-214 (1982)
CT	18	Conn. Gen. Stat. § 7-186a (Supp. 1986)
DL	18	Del. Code Ann. tit. 29, § 4810 (1983)
DC	18	D.C. Code Ann. § 2-2534 (1981)
FL	21	Fla. Stat. Ann. § 849.093 (West Supp. 1987)
GA	18	Ga. Code Ann. § 16-12-58 (1984)
HI	18	Haw. Rev. Stat. § 712-1231 (1976)
ID	—	Gambling Not Permitted by Statute
IL	18	Ill. Ann. Stat. ch. 120, para. 1102 (Smith-Hurd Supp. 1986)
IN	—	Gambling Not Permitted by Statute
IA	18	Iowa Code Ann. § 233.1 (West 1985)
KS	18	Kan. Stat. Ann. § 79-4706 (Supp. 1984)
KY	—	Gambling Not Permitted by Statute
LA	17	La. Rev. Stat. Ann. § 14:92 (West 1986)
ME	16	Me. Rev. Stat. Ann. tit. 17, § 319 (1983)
MD	18	Md. Ann. Code art. 9, § 124 (1984)
MA	18	Mass. Gen. Laws Ann. ch. 128A, § 10 (West 1974)
MI	18	Mich. Comp. Laws Ann. § 18.969(110a) (West 1986)
MN	—	Gambling Not Permitted by Statute
MS	21	Miss. Code Ann. § 97-33-21 (1972)
MO	18	Mo. Ann. Stat. § 313.280 (Vernon 1987)
MT	18	Mont. Code Ann. § 23-5-506 (1985)
NE	18	Neb. Rev. Stat. § 9-150 (Supp. 1984)
NV	21	Nev. Rev. Stat. § 463.350 (1985)
NH	18	N.H. Rev. Stat. Ann. § 287:2 (1978)
NJ	18	N.J. Stat. Ann. § 9:17B-1 (West Supp. 1986)
NM	—	Gambling Not Permitted by Statute
NY	18	N.Y. Tax Law § 1610 (McKinney 1987)
NC	—	Gambling Not Permitted by Statute

State	Age	Citation
ND	21	N.D. Cent. Code § 53-06.1-07.1 (Supp. 1985)
OH	18	Ohio Rev. Code Ann. § 3770.07 (Baldwin 1983)
OK	18	Okla. Stat. Ann. tit. 21, § 995.13 (West 1983)
OR	18	Or. Rev. Stat. § 163.575 (1985)
PA	18	Pa. Stat. Ann. tit. 10, § 305 (Purdon Supp. 1986)
RI	18	R.I. Gen. Laws § 11-19-32 (Supp. 1986)
SC	—	Gambling Not Permitted by Statute
SD	—	Gambling Not Permitted by Statute
TN	16	Tenn. Code Ann. § 39-6-609(f) (Supp. 1986)
TX	18	Tex. Rev. Civ. Stat. Ann. art. 179d, § 17 (Vernon Supp. 1987)
UT	—	Gambling Not Permitted by Statute
VT	18	Vt. Stat. Ann. tit. 31, § 674(J) (Supp. 1985)
VA	—	Gambling Not Permitted by Statute
WA	18	Wash. Rev. Code Ann. § 67.70.120 (1985)
WV	18	W. Va. Code § 19-23-9 (1986)
WI	18	Wis. Stat. Ann. § 163.51 (West 1974)
WY	19	Wyo. Stat. § 11-25-109 (1986)

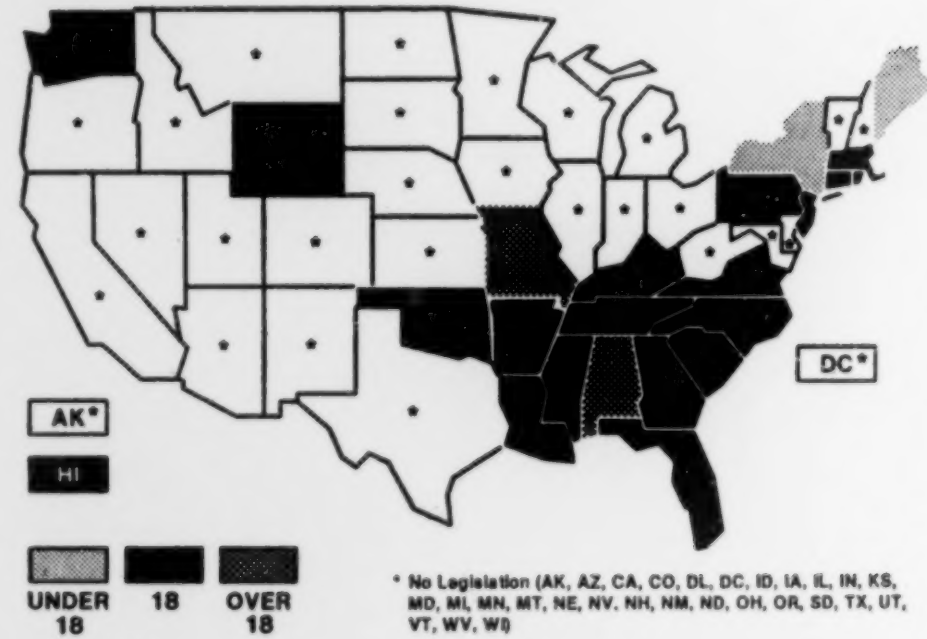
Totals (50 States and D.C.)

	Age					Gambling Not Permitted
	16	17	18	19	21	
Number	2	1	31	1	4	12

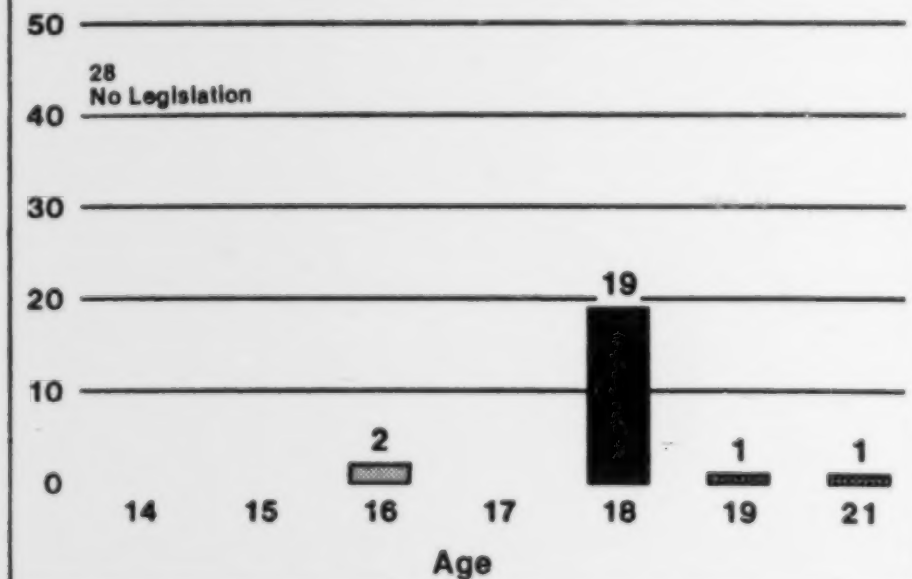
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APPENDIX H

Right to Patronize Pool Halls



Cumulative Totals by Age—50 States & D.C.



RIGHT TO PATRONIZE POOL HALLS

State	Age	Citation
AL	19	Ala. Code § 34-6-9 (1985)
AK	—	No Legislation
AZ	—	No Legislation
AR	18	Ark. Stat. Ann. § 41-2461 (1977)
CA	—	No Legislation
CO	—	No Legislation
CT	18	Conn. Gen. Stat. § 53-281 (1985)
DL	—	No Legislation
DC	—	No Legislation
FL	18	Fla. Stat. Ann. § 849.04 (West 1976) [Minor may not play where betting allowed]
GA	18	Ga. Code Ann. § 43-8-10 (1984) [Minors may not enter premises if alcohol sold]
HI	18	Haw. Rev. Stat. § 445-54 (1985)
ID	—	No Legislation
IL	—	No Legislation
IN	—	No Legislation
IA	—	No Legislation
KS	—	No Legislation
KY	18	Ky. Rev. Stat. Ann. § 436.320 (Michie/Bobbs-Merrill 1985)
LA	18	La. Rev. Stat. Ann. § 26:88 (West Supp. 1986)
ME	16	Me. Rev. Stat. Ann. tit. 26, § 773 (1974)
MD	—	No Legislation
MA	18	Mass. Gen. Laws Ann. ch. 140, § 179 (West 1974)
MI	—	No Legislation
MN	—	No Legislation
MS	18	Miss. Code Ann. § 97-5-11 (Supp. 1986)
MO	21	Mo. Ann. Stat. § 318.090 (Vernon 1963)
MT	—	No Legislation
NE	—	No Legislation
NV	—	No Legislation
NH	—	No Legislation
NJ	18	N.J. Stat. Ann. § 34:2-21.17 (West Supp. 1986)
NM	—	No Legislation
NY	16	N.Y. Gen. Bus. Law § 465 (McKinney 1984)

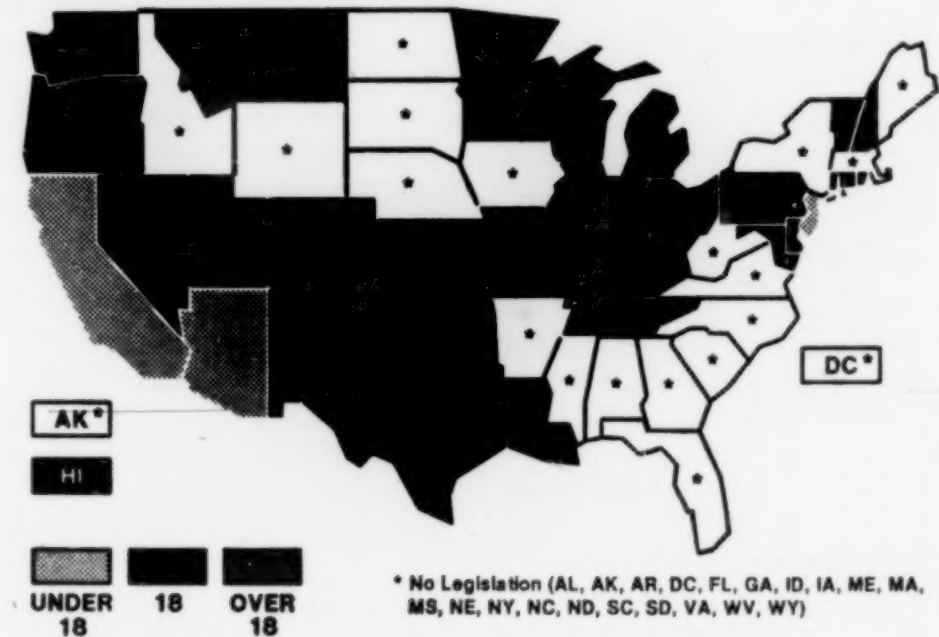
State	Age	Citation
NC	18	N.C. Gen. Stat. § 14-317 (1986) [Minors may not enter premises where alcohol sold]
ND	—	No Legislation
OH	—	No Legislation
OK	18	Okla. Stat. Ann. tit. 21, § 1103 (West Supp. 1983)
OR	—	No Legislation
PA	18	Pa. Stat. Ann. tit. 18, § 7105 (Purdon 1983)
RI	18	R.I. Gen. Laws § 5-2-13 (1976)
SC	18	S.C. Code Ann. § 20-7-350 (1985)
SD	—	No Legislation
TN	18	Tenn. Code Ann. § 39-4-419 (Supp. 1986)
TX	—	No Legislation
UT	—	No Legislation
VT	—	No Legislation
VA	18	Va. Code Ann. § 40.1-100 (1986)
WA	18	Wash. Rev. Code Ann. § 26.28.080 (1986)
WV	—	No Legislation
WI	—	No Legislation
WY	18	Wyo. Stat. § 33-6-108(b) (1986)

Totals (50 States and D.C.)

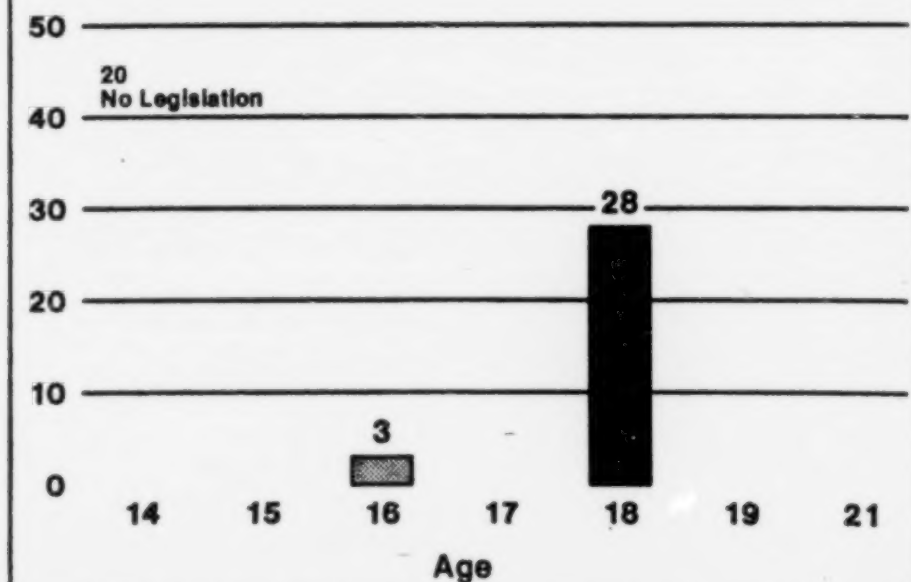
	No				
Age	16	18	19	21	Legislation
Number	2	19	1	1	28

APPENDIX I

Right to Pawn Property or to Sell to Junk or Precious Metals Dealers



Cumulative Totals by Age—50 States & D.C.



RIGHT TO PAWN PROPERTY OR TO SELL
TO JUNK OR PRECIOUS METALS DEALERS

State	Age	Citation
AL	—	No Legislation
AK	—	No Legislation
AZ	16	Ariz. Rev. Stat. Ann. § 44-1627 (Supp. 1986)
AR	—	No Legislation
CA	16	Cal. Fin. Code § 21207 (West 1981)
CO	18	Colo. Rev. Stat. § 12-56-104 (1985)
CT	18	Conn. Gen. Stat. § 21-47 (1985)
DL	18	Del. Code Ann. tit. 24, § 2312 (1981)
DC	—	No Legislation
FL	—	No Legislation
GA	—	No Legislation
HI	18	Haw. Rev. Stat. § 445-133 (1985)
ID	—	No Legislation
IL	18	Ill. Ann. Stat. ch. 23, para. 2366 (Smith-Hurd 1968)
IN	18	Ind. Code Ann. § 28-7-5-36 (Burns 1973)
IA	—	No Legislation
KS	18	Kan. Stat. Ann. § 16-717 (1981)
KY	18	Ky. Rev. Stat. Ann. § 226.030 (Michie/Bobbs-Merrill 1982)
LA	18	La. Rev. Stat. Ann. § 37:1764 (West Supp. 1987)
ME	—	No Legislation
MD	18	Md. Code Ann. art. 56, § 424 (1983)
MA	—	No Legislation
MI	18	Mich. Comp. Laws Ann. § 750.137 (West Supp. 1986)
MN	18	Minn. Stat. Ann. § 609.81 (West Supp. 1987)
MS	—	No Legislation
MO	18	Mo. Ann. Stat. § 568.070 (Vernon 1979)
MT	18	Mont. Code Ann. § 45-5-623 (1985)
NE	—	No Legislation
NV	18	Nev. Rev. Stat. § 647.140 (1985)
NH	18	N.H. Rev. Stat. Ann. § 398:2 (1983)
NJ	16	N.J. Stat. Ann. § 45:22-31 (West 1978)
NM	18	N.M. Stat. Ann. § 56-12-14 (1986)
NY	—	No Legislation

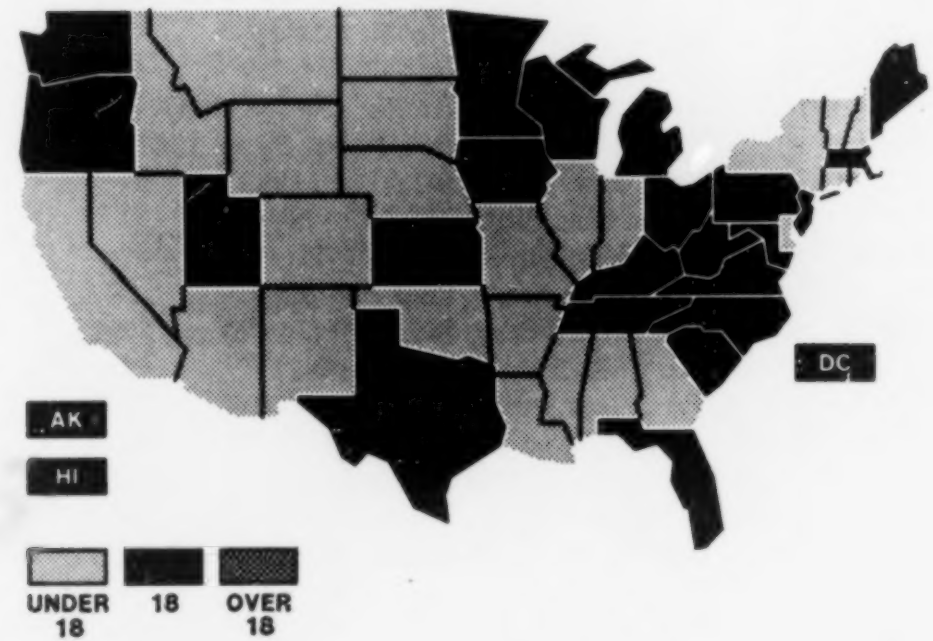
State	Age	Citation
NC	—	No Legislation
ND	—	No Legislation
OH	18	Ohio Rev. Code Ann. § 4727.10 (Baldwin 1984)
OK	18	Okla. Stat. Ann. tit. 59, § 1511 (West Supp. 1987)
OR	18	Or. Rev. Stat. § 726.270 (1985)
PA	18	Pa. Stat. Ann. tit. 63, § 281-29 (Purdon Supp. 1986)
RI	18	R.I. Gen. Laws § 19-26-12 (1982)
SC	—	No Legislation
SD	—	No Legislation
TN	18	Tenn. Code Ann. § 45-6-110 (1980)
TX	18	Tex. Rev. Civ. Stat. Ann. art. 5069-51.16 (Vernon 1987)
UT	18	Utah Code Ann. § 10-8-39 (1986)
VT	18	Vt. Stat. Ann. tit. 9, § 3870 (1984)
VA	—	No Legislation
WA	18	Wash. Rev. Code Ann. § 19.60.066 (Supp. 1987)
WV	—	No Legislation
WI	18	Wis. Stat. Ann. § 943.35 (West 1982)
WY	—	No Legislation

Totals (50 States and D.C.)

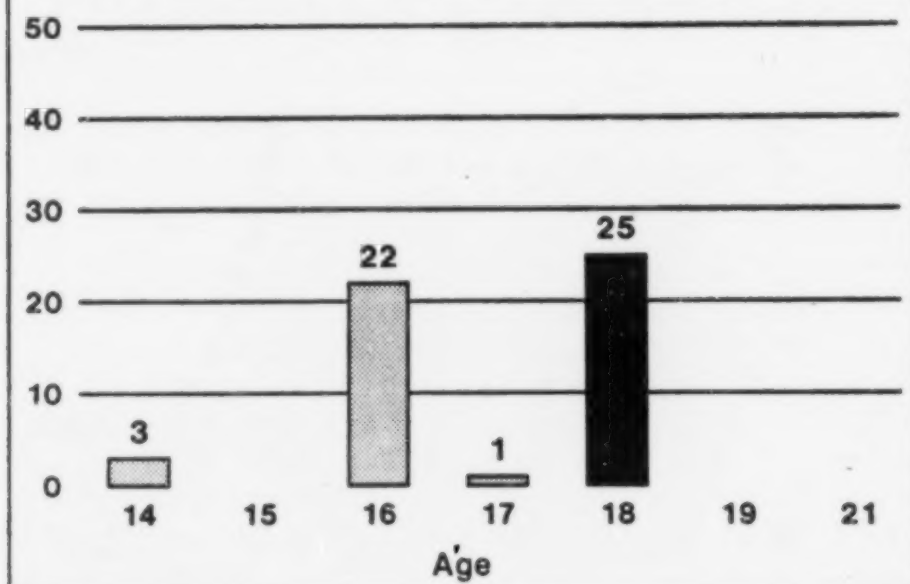
	No		
Age	16	18	Legislation
Number	3	28	20

APPENDIX J

Right to Work in Hazardous Occupations



Cumulative Totals by Age—50 States & D.C.



RIGHT TO WORK IN HAZARDOUS OCCUPATIONS

State	Age	Citation
AL	16	Ala. Code § 25-8-2 (1986)
AK	18	Alaska Stat. § 23.10.350 (1984)
AZ	16	Ariz. Const. art. 18, § 2
AR	16	Ark. Stat. Ann. § 81.702 (Supp. 1985)
CA	16	Cal. Lab. Code § 1292 (West Supp. 1987)
CO	14	Colo. Rev. Stat. § 8-12-110 (1986)
CT	16	Conn. Gen. Stat. § 31-24 (1987)
DL	16	Del. Code Ann. tit. 19, § 512 (1979)
DC	18	D.C. Code Ann. § 36-505 (1981)
FL	18	Fla. Stat. Ann. § 450.061 (West Supp. 1987)
GA	16	Ga. Code Ann. § 39-2-2 (1982)
HI	18	Haw. Rev. Stat. § 390-3 (1985)
ID	14	Idaho Code § 44-1301 (1977)
IL	16	Ill. Ann. Stat. ch. 48, para. 31.1 (Smith-Hurd 1986)
IN	17	Ind. Code Ann. § 20-8.1-4-24 (Burns 1975)
IA	18	Iowa Code Ann. § 92.8 (West 1984)
KS	18	Kan. Stat. Ann. § 38-602 (1986)
KY	18	Ky. Rev. Stat. Ann. § 339.230 (Michie/Bobbs-Merrill Supp. 1986)
LA	16	La. Rev. Stat. Ann. § 23:163 (West 1985)
ME	18	Me. Rev. Stat. Ann. tit. 26, § 772 (Supp. 1986)
MD	18	Md. Code Ann. art. 100, § 11 (1985)
MA	18	Mass. Gen. Laws. Ann. ch. 149, § 62 (West 1982)
MI	18	Mich. Comp. Laws Ann. § 409.103 (West 1985)
MN	18	Minn. Stat. Ann. § 181A.04 (West Supp. 1987)
MS	14	Miss. Code Ann. § 71-1-17 (1972)
MO	16	Mo. Ann. Stat. § 292.040 (Vernon 1965)
MT	16	Mont. Code Ann. § 41-2-101 (1985)
NE	16	Neb. Rev. Stat. § 48-313 (1984)
NV	16	Nev. Rev. Stat. § 609.190 (1973)
NH	16	N.H. Rev. Stat. Ann. § 276-A:4 (1978)
NJ	18	N.J. Stat. Ann. § 34:2-21.17 (West Supp. 1986)
NM	16	N.M. Stat. Ann. § 50-6-4 (1978)
NY	16	N.Y. Lab. Law § 133 (McKinney 1986)
NC	18	N.C. Gen. Stat. § 95-25.5 (1985)

State	Age	Citation
ND	16	N.D. Cent. Code § 34-07-16 (Supp. 1985)
OH	18	Ohio Rev. Code Ann. § 4109.05 (Baldwin 1983)
OK	16	Okla. Stat. Ann. tit. 40, § 72 (West 1986)
OR	18	Or. Rev. Stat. § 653.330 (1985)
PA	18	Pa. Stat. Ann. tit. 43, § 44 (Purdon Supp. 1986)
RI	16	R.I. Gen. Laws § 28-3-10 (1986)
SC	18	S.C. Code Ann. § 41-13-20 (1986)
SD	16	S.D. Codified Laws Ann. § 60-12-3 (1978)
TN	18	Tenn. Code Ann. § 50-5-104 (1983)
TX	18	Tex. Rev. Civ. Stat. Ann. art. 5181.1 (Vernon 1987)
UT	18	Utah Code Ann. § 34-23-2 (1974)
VT	16	Vt. Stat. Ann. tit. 21, § 437 (1978)
VA	18	Va. Code Ann. § 40.1-100 (1986)
WA	18	Wash. Rev. Code Ann. § 26.28.070 (1986)
WV	18	W. Va. Code § 21-6-2 (1985)
WI	18	Wis. Stat. Ann. § 103.65 (West 1974)
WY	16	Wyo. Stat. § 27-6-112 (1983)

Totals (50 States and D.C.)

Age	14	16	17	18
Number	3	22	1	25

APPENDIX K

STATE OF MARYLAND
OFFICE OF THE GOVERNOR

[SEAL]

WILLIAM DONALD SCHAEFER IN REPLY REFER TO: GO-02
GOVERNOR

April 7, 1987

Honorable R. Clayton Mitchell, Speaker
Maryland House of Delegates
Room 101, State House
Annapolis, Maryland 21401

Dear Speaker Mitchell:

The matter of exempting minors from the death penalty will come before you in the form of Senate Bill 598. When it does, I hope you will treat it favorably.

The measure bears impressive credentials. It is the first bill of its kind to pass the Senate. I was struck by the fact that the decisive Senate votes came not from newly-elected members of that Chamber, but from Senate veterans who had opposed an exemption for minors in previous years.

The bill also has the support of the principal spokespeople of all of the State's major religious faiths. This impressive coming together of our State's religious leadership may be unprecedented.

I believe it is for the good of the children of our State to establish a minimum age for the imposition of the death penalty, indeed, as have most other states and most other nations. Maryland law itself currently recognizes that age can be considered a mitigating factor at the sentencing phase of a capital trial.

I must, however, express my concern with the Amendments placed on the bill by the Judiciary Committee.

These Amendments would change the application of the death penalty exemption from under 18 to under 16. Eighteen years of age is recognized by international agreements to which the United States is signatory as the appropriate age for which the death penalty for capital crimes should be considered. Indeed, nine other states in our country set a minimum of 18 for the imposition of the death penalty. This is a significantly larger number of states than those which recognize any other minimum age cutoff.

As a State, we also distinguish the actions of children from the actions of adults. In the area of contracts, motor vehicles and voting, we recognize that juveniles are not fully responsible for their actions. Society as a whole shares responsibility for the actions of its children.

I have not come to this position quickly or lightly. Families and friends of murder victims have intense and legitimate needs, most often overlooked by the criminal justice process. Although we have made tremendous efforts as a State to help victims to no longer be dominated by their tragic loss, much more needs to be done. However, I do not believe that the execution of convicted juveniles can contribute to us fulfilling our obligation to crime's victims.

It is my sincere hope that you will work to return Senate Bill 598 to the same posture as it was first read in the House of Delegates and act favorably on our legislation.

Thank you very much for allowing me to express my views to you on this important issue. I know that this issue is an important personal decision for all of us to make.

Sincerely,

/s/ Don Schaefer
Governor

cc: Members of the
House of Delegates

(11)
No. 86-6169

Supreme Court, U.S.
FILED

MAY 14 1987

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,
Petitioner

v.

THE STATE OF OKLAHOMA,
Respondent

On Writ of Certiorari to the Court of
Criminal Appeals of the State of Oklahoma

**BRIEF OF AMICUS CURIAE
THE AMERICAN BAR ASSOCIATION**

EUGENE C. THOMAS *
President
American Bar Association

ANDREW J. SHOOKHOFF
STEVEN H. GOLDBLATT
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

* Counsel of Record

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

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WILLIAM WAYNE THOMPSON,
Petitioner

v.

THE STATE OF OKLAHOMA,
Respondent

On Writ of Certiorari to the Court of
 Criminal Appeals of the State of Oklahoma

BRIEF OF AMICUS CURIAE
 THE AMERICAN BAR ASSOCIATION

INTEREST OF THE AMICUS CURIAE
 AND SUMMARY OF ARGUMENT

The American Bar Association [hereinafter "ABA"] is a voluntary, national membership organization of the legal profession. Its over 329,000 members come from every state and territory and the District of Columbia. The constituency of the ABA includes prosecutors, public defenders, private attorneys, trial and appellate judges at the state and federal levels, legislators, law enforcement and corrections professionals, law school deans, law professors, law students, and a number of non-lawyer associates in allied fields.

Since its inception over one hundred years ago, the ABA has taken an active interest in improving the administration of justice. It has also taken a special interest in the improvement of the juvenile justice system. Toward these ends the ABA has promulgated two comprehensive sets of standards, the ABA *Standards for Criminal Justice* and, in conjunction with the Institute of Judicial Administration (IJA), the IJA/ABA *Juvenile Justice Standards*.

The IJA/ABA Juvenile Justice Standards Drafting Project, which was completed in 1980 with the adoption of the *Juvenile Justice Standards*, involved one of the most thorough studies of our society's response to the problems of juvenile crime ever undertaken. The Standards not only provide a thorough analysis of the historical, legal, and criminological developments in society's effort to respond to juvenile crime, but, because of the diversity of disciplines and perspectives represented by the contributors, the Standards in many ways reflect our society's knowledge, attitudes and values about children who commit crimes. The Project took no position on the death penalty.

In 1983, however, the ABA House of Delegates adopted a resolution opposing, on policy grounds, capital punishment for crimes committed by minors under the age of eighteen years [hereinafter referred to as the "juvenile death penalty"]: "BE IT RESOLVED, that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18)." ABA, *Summary of Actions of the House of Delegates, 1983 Annual Meeting, Reports of Sections 17*. The House of Delegates took no position on the constitutionality of the juvenile death penalty. The adoption of the House resolution followed almost two years of research and consideration of the issue by the ABA Section on Criminal Justice, as summarized in its Report to the House of

Delegates in support of the resolution. ABA, Criminal Justice Section, *Report with Recommendations to the House of Delegates*, Report No. 117A (August 1983) (hereinafter cited "ABA Juvenile Death Penalty Report").

The imposition of the death penalty for crimes committed by minors presents its own special concerns of justice. This claim is underscored by the fact that the ABA had rejected resolutions to limit the use of the death penalty for adults. In 1977, the ABA Section on Individual Rights and Responsibilities proposed a resolution urging the state legislatures to abolish the death penalty in all cases. That resolution failed by a 168-69 vote. ABA *Summary of Actions of the House of Delegates, 1977 Mid-year Meeting, Reports of Sections 18*. In 1979, the ABA Criminal Justice Section proposed a resolution to approve sentencing guidelines limiting the circumstances under which capital punishment could be imposed. That resolution failed in the House of Delegates by voice vote. ABA *Summary of Actions of the House of Delegates, 1979 Annual Meeting, Reports of Sections 23*.

Our society recognizes that minors are less mature, less experienced, less able to exercise good judgment and self-restraint, more susceptible to environmental influence (both positive and negative), and as a result, less responsible and less culpable in a moral sense than adults. See IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts 3* (1980). In light of these characteristics, minors are neither entitled to all the rights and privileges of adulthood, nor are they given the full obligations of adulthood until they reach their eighteenth birthdays. See, e.g., U.S. Const. amend. XXVI, § 1.

Because our criminal justice system is based on concepts of individual responsibility, the differences between minors and adults in their capacities to assume such responsibility, recognized in other legal contexts, should be reflected in our response to crimes committed by minors.

The development of the juvenile justice system is the clearest manifestation of society's commitment to this principle of separate treatment of adult and juvenile offenders. Notwithstanding the distinctions in law and fact between minors and adults, the juvenile justice system cannot deal with all juvenile crime. Some minors who commit serious crimes must be subject to trial and sentencing in the criminal justice system in order adequately to protect society and vindicate the criminal laws. However, the fact that a minor is appropriately tried in the criminal justice system does not mean that the ultimate criminal sanction, execution, is appropriate.

The special nature of childhood in our society led to the ABA position against the juvenile death penalty and is directly relevant to the issue before the Court. The death penalty is reserved for people whose crimes are so severe, whose character is so depraved, and whose moral culpability is so great as to warrant the ultimate sanction. *See generally Zant v. Stephens*, 462 U.S. 862 (1983); *Gregg v. Georgia*, 428 U.S. 153 (1976). For the same reason we in other legal contexts conclusively presume that minors are not mature and responsible to the same extent as adults, they should not be held to the degree of moral accountability necessary to justify the ultimate sanction of execution.

ARGUMENT

BECAUSE MINORS ARE NOT CAPABLE OF EXERCISING THE FULL RESPONSIBILITIES OF ADULTHOOD, THEY SHOULD NOT BE HELD TO THE LEVEL OF MORAL ACCOUNTABILITY NECESSARY TO JUSTIFY THE IMPOSITION OF THE PUNISHMENT OF DEATH.

Although the ABA has taken no position on the constitutionality of the juvenile death penalty, the reasons for opposing that sanction as a matter of policy are relevant to this Court's consideration of the constitutional issue. The ABA policy both derives from and reflects the special significance that our society attaches to the status of minority—a special significance that shapes and defines the issue in this case.

As this Court has observed in a number of different contexts, “children have a very special place in life which the law should reflect.” *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). In cases which present fundamental questions involving minors—in this case questions of life and death—we cannot ignore the significance of the status of minority. “Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children.” *Id.*

Minors are “most susceptible to influence and psychological damage” and “lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental.” *Bellotti v. Baird*, 443 U.S. 602, 635 (1979). They are in the early stages of their emotional growth; their intellectual development is incomplete; they have only limited practical experience; and their value systems are not yet clearly identified and firmly adopted. *Schall v. Martin*, 467 U.S. 253, 265 n.15 (1984) (citing *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 350 N.E.2d 906 (1976)). Unlike adults, minors are always in some

form of custody and subject to the control of their parents or the state as *parens patriae* upon whom the responsibility of making important decisions for the minor traditionally rests. *Schall v. Martin*, 467 U.S. at 265; *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

It is only upon the premise that a minor "is not possessed of that full capacity for individual choice . . . that a state may deprive children of . . . rights—the right to marry, for example or the right to vote—deprivations that would be constitutionally intolerable for adults." *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring). The law thus "recognizes a host of distinctions between the rights and duties of children and those of adults." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985) (Powell, J., concurring.)

This recognition is apparent in the development of a separate juvenile justice system for dealing with juvenile crime. Separate treatment of juveniles for their criminal conduct is a relatively recent development. Under common law, children over the age of seven (the age below which a child was considered incapable of possessing criminal intent) were subjected to criminal prosecution and punishment like adult offenders. *In re Gault*, 387 U.S. 1, 16 (1967). However, reaction to the harshness of a system that made no distinction between minor and adult when criminal conduct was involved was widespread and led to the development of separate juvenile justice systems in every jurisdiction in the country. *Id.* at 14-15. The underlying premise of this separate system was that minors are less mature, less able to exercise control and judgment, more easily influenced by others and by their environment and thus less culpable than adults for their actions.

Despite the more recent recognition that the achievements of separating systems of juvenile and criminal justice have fallen short of the goals, *see id.* 387 U.S. at 17-18, our society has not abandoned the underlying

premise that minors who commit crimes should be treated differently from adults. *See, e.g., McKeiver v. Pennsylvania*, 403 U.S. 258 (1973); *Schall v. Martin*, 467 U.S. 253 (1984). Thus, the IJA/ABA *Juvenile Justice Standards*, which provide a candid critique of the juvenile justice system and call for considerable system reform, nevertheless reaffirm the vitality of this underlying principle.¹ *See IJA/ABA Standards for Juvenile Justice: Summary and Analysis* 40-41 (1982).

While not addressing the death penalty issue directly, the IJA/ABA *Juvenile Justice Standards* deal specifically with the issue of subjecting some minors who commit crimes to the jurisdiction of the criminal court. Notwithstanding our recognition that minors should not be held to the same standards of criminal responsibility as adults, the protection offered by the juvenile justice system is not appropriate for some minors. IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts* 3. Some acts are so offensive to the community that only criminal court jurisdiction can ensure that control is maintained over the juvenile offender for a period proportionate to his offense and prior record. *Id.* However, the existence of a mechanism for transfer of jurisdiction and the acceptance of the necessity of being able to exercise criminal court jurisdiction over children for commis-

¹ There is a tendency to distinguish the juvenile justice system from the criminal justice system by contrasting the "rehabilitative" goals of the former with the "punitive" goals of the latter. However, as this Court has noted, the juvenile justice system has punitive characteristics, *see In re Gault*, 387 U.S. at 27-30; and the criminal justice system is not unconcerned with treatment and rehabilitation. *See Breed v. Jones*, 421 U.S. 519, 530 n.12 (1975). In the ABA's view, whether the guiding principle articulated is treatment, rehabilitation, protection of society through deterrence, or retribution, it is the fact of childhood and the fundamental differences between minors and adults that are the critical factors which ultimately provide the rationale for separate systems. *See IJA/ABA Juvenile Justice Standards Relating to Dispositions, Standard 1.1 and commentary thereto* (1980).

sion of serious crimes does not establish the propriety of treating a minor as an adult for the specific and extreme purpose of imposing the death penalty. The transfer decision—whether discretionary with the judge or prosecutor or mandated by the legislature—does not involve a determination that a minor is as mature as an adult and often involves no consideration of individual maturity, especially when the offense is most serious. See Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L. Rev. 757, 771-72 (1986); Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. and Criminology, 1471, 1476-79 (1983). Rather the transfer of jurisdiction is often a pragmatic decision that the limited jurisdiction of the juvenile justice system cannot provide adequate protection for the community.

The factors that warrant transfer and the concomitant decision to subject the minor to the lengthy sentences available in criminal court thus do not resolve the issue of the propriety of the death penalty for the minor who is transferred. It is not at all incongruous to find states in which the juvenile death penalty had been statutorily permissible lowering the minimum age for transfer to adult court as part of “getting tough” on juvenile crime while at the same time eliminating the juvenile death penalty. See, e.g., Tenn. Code Ann. § 37-1-134(1) (1984) (1982 amendments); Or. Rev. Stat. §§ 161.620 (1985), 419.533 (1983) (1985 amendments).

The issue before this Court is whether a minor can, consistent with the Eighth Amendment, be held to that level of responsibility and moral culpability for which society reserves the penalty of death. The words of the Eighth Amendment proscribing imposition of criminal penalties which are cruel and unusual, “are not precise and . . . their scope is not static.” *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion). The meaning of the Amendment is drawn “from the evolving

standards of decency that mark the progress of a maturing society.” *Id.* at 101. Thus, punishments which may have been accepted by society when this amendment was adopted can come to be viewed in our time as excessive and unconstitutional. *Gregg v. Georgia*, 428 U.S. at 171 (opinion of Stewart, Powell and Stevens, JJ.).

The death penalty is different in kind from any other criminal punishment; it is “unique in its severity and irrevocability.” *Id.* at 187. In light of this, this Court has held that the discretion to impose the death penalty must be limited and directed to ensure that it is not inflicted in an arbitrary and capricious manner. *Zant v. Stephens*, 462 U.S. at 874. Not only must the sentencing authority be provided guidelines, but it must be able to consider any and all mitigating factors, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion), including the character and record of the individual and the circumstances of the particular offense, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) and must in fact consider such mitigating factors. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

In certain situations, however, the Court has refused to allow the sentencing authority the discretion to determine whether a defendant should live or die based on a balancing of aggravating and mitigating circumstances presented by the individual case. If the crime is the rape of an adult woman and it does not result in the death of the victim, the death penalty is prohibited. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). If the crime results in the death of the victim, but the person charged is guilty of felony murder *simpliciter*, the death penalty is prohibited. *Enmund v. Florida*, 458 U.S. 782, 788 (1982). For felony murders, the standard appears to be that the death penalty may be imposed if the defendant is a major participant in the felony committed who acted intentionally or with reckless in-

difference to human life. *Tison v. Arizona*, 55 U.S.L.W. 4496, 4502 (U.S. April 21, 1987). Thus, there are situations in which ensuring an individualized consideration of the circumstances of the offense simply does not satisfy the Eighth Amendment; this Court has therefore prohibited execution in such cases.

This Court has already recognized that the youth of a defendant is a mitigating factor which is entitled to great weight, *Eddings v. Oklahoma*, 455 U.S. at 116, and that in a young person, "there can be no doubt that evidence of a turbulent family history . . . is particularly relevant." *Id.* at 115. The issue in this case is whether, when the crime is committed by a minor, the fact of minority is of such overriding importance that a bright line must be drawn prohibiting execution.

In determining whether a particular punishment once tolerated can no longer be reconciled with our advancing standards of decency, the Court has looked to various indicia of contemporary values and attitudes. *Coker v. Georgia*, 433 U.S. at 592, 596 n.10. The ABA Juvenile Death Penalty Report considered such indicia of contemporary values and attitudes as international and legislative norms, viewed in light of our treatment of minority in other jural contexts, in concluding that civilized society should no longer allow execution for crimes committed by minors.

The juvenile death penalty is overwhelmingly rejected in the international community. Article (6) (5) of the International Covenant on Civil and Political Rights, ratified by 81 nations of the world (including most of the Western European countries and Canada), and signed by another nine nations (including the United States), prohibits imposition of the death penalty for crimes committed by those under the age of eighteen. G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966). Article 4(5) of the American Convention on Human Rights, ratified by nineteen American

states and signed by an additional three (including the United States) includes a similar prohibition.² OAS T.S. No. 36, OAS, O.R. OEEA/Ser. A/16/1969. While 28 countries have abolished the death penalty altogether, Amnesty International, *United States of America: The Death Penalty* 228 (1987), over forty countries which have retained the death penalty have statutory provisions prohibiting execution of juvenile offenders. Hartman, "Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty," 52 U. Cinn. L. Rev. 655, 666 n.44 (1983).³ Out of thousands of executions reported between January 1980 and May 1986, only eight in four countries were for acts committed by those under age eighteen, including three in the United States. Amnesty International, *United States of America: The Death Penalty* 74 (1987).

Legislative trends in the United States also reflect the unacceptability of the juvenile death penalty. While the re-enactment of the death penalty statutes in thirty-five jurisdictions since this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), indicates considerable public acceptance of the death penalty, see *Gregg v. Georgia*, 428 U.S. at 179-80 (Stewart, Powell and Stevens, JJ.), it does not indicate an affirmative endorsement of the

² The United States signed the International Covenant on Civil and Political Rights and the American Convention on Human Rights with express limitations. President Carter submitted both to the Senate for ratification, subject to declarations, reservations and understandings regarding all provisions (including those relating to the juvenile death penalty) which were in conflict with existing United States laws. See Message to Senate, 14 Weekly Comp. of Pres. Doc. 395, 396 (1978), and accompanying State Department Letters of Submittal, S. Exec. Doc. Nos. C, D, E and F, 95th Cong., 2d Sess., v-xv and xvii-xxiii (1977). The Senate has yet to act on these proposals.

³ There is some variation in the age chosen by the wide range of countries which prohibit execution of juveniles and some countries use the terms "minors" or "young people" without specifying the age; however, at least 33 choose ages of eighteen or older. *Id.*

juvenile death penalty. This is reflected by the increasing number of states that upon specific consideration of the juvenile death penalty have rejected it. Thus, at present eleven states which permit the death penalty for adults, prohibit executions for crimes committed by minors under age eighteen. Cal. Penal Code § 190.5 (West Supp. 1986); Colo. Rev. Stat. § 16-11-103 (Supp. 1985); Conn. Gen. Stat. Ann. § 53a-46a(g)(1) (West 1985); Ill. Ann. Stat. ch. 38 § 9-1(b) (Smith-Hurd Supp. 1985); Md. Code Ann. art. 27 § 412 (1987); Neb. Rev. Stat. § 28-105.01 (1982); N.J. Stat. Ann. § 2C:11-3F (West 1986) (P.L. 1985, ch. 4780 approved Jan. 17, 1986); N.M. Stat. Ann. § 31-18-14A (1979); Ohio Rev. Code Ann. § 2929.03(E) (Page 1982); Or. Rev. Stat. § 161.620 (1985); Tenn. Code Ann. § 37-1-134(1) (1984). Taking into account the fifteen jurisdictions which have no death penalty,⁴ there are twenty-six jurisdictions that prohibit the imposition of the death penalty for crimes the defendant committed while under age eighteen.

Moreover, in three states, including two of those which have executed persons since this Court's decision in *Furman*, the death penalty may not be imposed for crimes committed when the defendant was under age seventeen, Ga. Code Ann. § 17-9-3 (1982); N.H. Rev. Stat. Ann. § 630.5(II)(b)(5) (Supp. 1983); Tex. Penal Code Ann. § 8.07(d) (Vernon Supp. 1985), suggesting agreement in principle with the concept that minority should be a bar to execution.⁵ In fact, the elimination of the juvenile death penalty takes on added significance in light of the

⁴ Thirteen states and the District of Columbia have abolished the death penalty. Amnesty International, *United States of America: The Death Penalty* 194 (1987). Vermont has not reenacted a death penalty statute since *Furman*, but retains a pre-*Furman* statute (codified at Vt. Stat. Ann. 13 § 2303(c) (Supp. 1986)) that is clearly invalid.

⁵ One state bars the death penalty if the minor was under age sixteen when the crime was committed. Nev. Rev. Stat. § 176.025 (1979).

overall tendency toward greater use of the death penalty in these states.

This Court has recognized that deterrence and retribution are legitimate bases for imposing criminal penalties including capital punishment. *Gregg v. Georgia*, 428 U.S. at 183 (1976) (opinion of Stewart, Powell and Stevens, JJ). The ABA Juvenile Death Penalty Report considered the value of deterrence and retribution. It concluded that these justifications "... lose much of their persuasiveness when applied to an adolescent's case." ABA Juvenile Death Penalty Report 8-9. Whatever deterrent effect might exist for potential adult offenders, *Gregg v. Georgia*, 428 U.S. at 184-85, numerous commentators have concluded that, in light of the characteristics associated with childhood—impulsiveness, lack of self control, poor judgment, feelings of invincibility—the deterrent value of the juvenile death penalty is likely of little consequence. See, e.g., Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. and Criminology, 1471, 1511-13 (1983); Note, *The Decency of Capital Punishment for Minors: Contemporary Standard and the Dignity of Juveniles*, 61 Ind. L. J. 757, 788-90 (1986). In any event, it would be difficult to support a claim that the death penalty as a deterrent for juvenile crime, as opposed to life imprisonment, "is an indispensable part of the State's criminal justice system." *Coker v. Georgia*, 437 U.S. at 592 n.4. Whatever deterrent value might exist is insignificant when balanced against the societal values compromised by the juvenile death penalty.

Retribution, defined by this Court as "the expression of society's moral outrage at particularly offensive conduct." *Gregg v. Georgia*, 428 U.S. at 183, is also an unsatisfactory justification for the juvenile death penalty. The moral force of—and thus the legal justification for—taking human life in retribution is dependent on the degree of culpability of the offender, and not just on the

injury to the victim. See *Enmund v. Florida*, 458 U.S. at 800. Because of our societal attitudes and well-founded legal presumptions regarding the status of minority, a minor simply cannot be held to that degree of culpability and accountability.

In his dissent in *In re Gault*, Justice Stewart referred to the effort to treat criminal behavior of minors differently from adults as "the enlightened task of bringing us out of the world of Charles Dickens in meeting our responsibilities to the child in our society." *In re Gault*, 387 U.S. at 78, 79 (Stewart, J., dissenting). He feared that this Court might "invite a long step backwards into the 19th century" and referred specifically to the time that our society did not recognize a distinction between minors and adults in the criminal law and executed a 12-year-old boy. *Id.* The imposition of capital punishment for crimes committed by minors is a vestige of those unenlightened times to which Justice Stewart referred and should be prohibited.

CONCLUSION

The ABA is opposed to the juvenile death penalty and submits this brief as an aid to the Court in its disposition of this case.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,
Petitioner,
VS.

THE STATE OF OKLAHOMA,
Respondent.

**On Writ Of Certiorari To The Court Of Criminal
Appeals Of The State Of Oklahoma**

**BRIEF FOR AMICUS CURIAE
INTERNATIONAL HUMAN RIGHTS LAW GROUP IN
SUPPORT OF PETITIONER**

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INTEREST OF AMICUS

The International Human Rights Law Group (Law Group) is a non-profit public interest organization incorporated in the District of Columbia. Its goals include the development and promotion of legal norms of international human rights. To that end, the Law Group has represented individuals and organizations, on a pro bono basis, before United States and international tribunals.

With respect to the issue of the execution of juvenile offenders in the United States, the Law Group has testified in opposition to such practice before Congress and has co-sponsored a petition challenging the practice before the Inter-American Commission on Human Rights. The Commission, in a decision issued March 27, 1987, determined that the United States is violating Article I

(right to life) and Article II (right to equality before law) of the American Declaration of Human Rights by permitting the death penalty to be applied to juvenile offenders.

The Law Group respectfully submits and intends to demonstrate to this Court that relevant customary international human rights law, binding on the United States, prohibits the execution of juvenile offenders.

STATEMENT OF THE CASE

The petitioner, William Wayne Thompson, was convicted of first-degree murder and sentenced to death by an Oklahoma jury in 1983. Thompson was fifteen years of age when he, his older brother and two men killed his ex-brother-in-law in an unusually brutal fashion. Under Oklahoma's juvenile offender system, Thompson was certified

to stand trial as an adult. Each defendant was tried separately and each was convicted and sentenced to death.

Thompson's conviction was upheld by the Oklahoma Court of Criminal Appeals on August 29, 1986. That Court rejected petitioner's argument that execution of Thompson for a crime he committed at the age of fifteen would be unconstitutional cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The Court stated that "once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult." Thompson v. Oklahoma, 724 P.2d 780 (Okla. Cr. 1986).

SUMMARY OF ARGUMENT

Under the Supremacy Clause of the Constitution (Article VI, Section 2), the states of the union are obliged to

respect international law, including customary international law. The Paquete Habana, 175 U.S. 677 (1900).

The prohibition against executing individuals for crimes committed prior to their eighteenth birthday has developed into a norm of customary international law. Compelling evidence of the existence of this norm is found in the explicit provisions of three major human rights treaties, prohibiting execution of juvenile offenders, as well as in the practices of a large group of nations with diverse political, social and cultural traditions. The United States in large measure supported the development of this norm and certainly does not qualify as a "persistent objector" to it.

Given the existence of this international law norm, amicus submits that under Article VI of the United

States Constitution, Oklahoma is precluded from executing petitioner for a crime committed prior to his eighteenth birthday.

Amicus also submits that execution of the petitioner would violate United States treaty obligations. The United States has signed, but not ratified, treaties which prohibit the execution of juvenile offenders. Having signed these treaties, under the Vienna Convention on the Law of Treaties and under customary international law, the United States is bound not to defeat their object and purpose pending ratification. Since execution is irreversible, such an act would defeat the object and purposes of the signed human rights treaties in the sense proscribed by the Vienna Convention.

Even if the Court does not find that a binding norm of international law

exists, the almost universal international abhorrence to the imposition of the death penalty on those who were under the age of eighteen at the time of theri offenses should be considered in interpreting the Eighth Amendment.

For all of these reasons, amicus submits that the decision of the Oklahoma Court of Criminal Appeals should be reversed.

ARGUMENT

I. CUSTOMARY INTERNATIONAL LAW WHICH FORMS PART OF THE LAW OF THE UNITED STATES PROHIBITS THE EXECUTION OF JUVENILE OFFENDERS

There are two general approaches to the application of international law before United States courts. The first approach looks to international law and the development of international norms to inform various provisions of the United States Constitution, including the Eighth

Amendment. 1/ The second approach, which is advanced in this brief, holds that the prohibition against execution of juvenile offenders is a norm of customary international law binding on the United States. As such, under Article VI of the United States Constitution, the several states are bound not to execute individuals for crimes committed prior to their eighteenth birthday.

A. Customary International Law Is Part Of The Law Of The United States.

That international law is part of United States law, applicable to

1/ See generally Christenson, Using Human Rights Law to Inform Due Process and Equal Protection Analysis, 52 U. Cin. L. Rev. 3 (1983); see also Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting Application of the Death Penalty, 52 U. Cin. L. Rev. 655 (1983). The brief submitted amicus curiae by Amnesty International develops this argument as it relates to the instant case.

disputes among individuals as well as between individuals and the state, has long been recognized. See The Nereide, 13 U.S. (9 Cranch.) 388, 422 (1815) and The Paquete Habana, 175 U.S. 677 (1900). ^{2/} In fact, as the Second Circuit noted in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980),

[t]he law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became part of the common law of the United States upon the adoption of the Constitution. ^{3/}

Treaties are expressly made part of United States law by Article VI of the Constitution; customary international law has always been understood and applied as

^{2/} See generally Dickenson, The Law of Nations as Part of the National Law of the United States, (pts. 1 and 2), 101 U. Pa. L. Rev. 26, 792 (1952).

^{3/} Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980).

the law of the Republic, a principle recognized by the Court in The Paquete Habana, supra. 4/

It is clear that not only international law as it existed in 1789 may be applied by United States courts. The evolving nature of international law was recognized in United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) and in Ware v. Hylton, 3 U.S. (3 Dall.) 198 (1796). 5/ As Justice Story put it in the case of La Jeune Eugenie:

It does not follow . . . that because a principle cannot be found settled by the consent and practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as

4/ See also Dickenson, supra n.1.

5/ Filartiga v. Pena-Irala, 630 F.2d at 887.

incorporated into the public
code of nations. 6/

This principle is especially significant
in a case such as this, involving a norm
which has developed over the last forty
years.

While ascertaining customary
international law presents problems
different from those of finding domestic
law, those practical difficulties in no
way affect the binding force of customary
international law. In the famous words
of Mr. Justice Gray,

[i]nternational law is part of
our law, and must be ascertained
and administered by the courts
of justice of appropriate
jurisdiction as often as
questions of right depending
upon it are duly presented for
their determination. For this
purpose, where there is no
treaty and no controlling

6/ U.S. v. La Jeune Eugenie, 26 F. Cas.
833, 846 (C. C. D. Mass. 1822)
(No. 15,551) (holding that an
international norm forbidding slavery
exists).

executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves particularly well acquainted with the subjects of which they treat.

The Paquete Habana, 175 U.S. at 700. See also Filartiga v. Pena-Irala, supra. Further, the role of custom as a source of international law is expressly recognized in Article 38 of the Statute of the International Court of Justice, T.S. No. 993, 59 Stat. 1055, 1060 (ratified July 28, 1945).

Two primary criteria are used to determine whether a principle has attained the status of a rule of customary international law. First, there must be evidence of State practice to show that the norm has been generally

adopted by nations. 7/ Second, the State practice should be accompanied by opinio juris or evidence that the norm has been accepted as giving rise to an international law obligation. 8/ Courts will look to treaties, national laws, the practice of international organizations and secondary materials as evidence of the existence of a customary norm of international law. For example, in Filartiga, supra, Judge Kaufman relied on treaty provisions, resolutions of public international bodies and opinions of prominent scholars to discover the norm

7/ See Hartman, supra, note 1, at 666, 668, and sources cited therein, including Akehurst, Custom as a Source of International Law, 47 Brit. Y. B. Int'l L. 1, 53 (1974) at 18, 53; A. D'Amato, The Concept of Custom in International Law 87-92 (1971).

8/ See Hartman, supra, note 1 at 671; Akehurst, id. at 31-35, 53; K. Wolfke, Custom in Present International Law (1964).

prohibiting torture. See also the extensive discussion of the sources establishing a customary norm prohibiting the slave trade found in La Jeune Eugenie, supra.

B. Human Rights Treaties And The Practice Of Nations Establishes The Prohibition Against Capital Punishment Of Juvenile Offenders As A Norm Of Customary International Law.

1. Human Rights Treaties

Human rights treaties provide the most authoritative source of customary international law on the question of execution of juvenile offenders. The Vienna Convention on the Law of Treaties ^{9/} recognizes in Article 38 that a treaty may become "binding upon

^{9/} U.N. Doc. A/CONF. 39/27 (1969), 63 A.J.I.L. 875 (1969) entered into force January 27, 1980, transmitted to the Senate for advice and consent on November 21, 1971, but not yet ratified.

a third State as a customary rule of international law, recognized as such." At least three major human rights treaties explicitly prohibit the imposition of the death penalty on juvenile offenders. 10/ An additional instrument, Protocol No. 6 to the European Convention on Human Rights, ratified by five nations and signed by all but six of the twenty-one Member States of the Council of Europe,

10/ American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI 1.1, Doc. 65 Rev. 1 Con. 1 (1970) at Art. 4(5); International Covenant on Civil and Political Rights, Art. 6(5), Annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16), at 53, U.N. Doc. A/6316 (1966); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 68, 6 U.S.T. 3516, T.I.A.S. No. 3365 § 75 U.N.T.S. 287.

abolishes the death penalty entirely for crimes during peacetime. 11/

The human rights treaties exempting juvenile offenders from execution have been accepted and ratified by nations throughout the world as delineating international legal obligations. 12/ Their provisions proscribing the death penalty for

11/ Opened for signature April 23, 1983, entered into force March 1, 1985, 1983 Europ. T.S. No. 114, reprinted in 22 I.L.M. 539 (1983).

12/ The greater the number of parties to such international human rights treaties the greater the inference that these instruments have become customary international law. As the International Court of Justice stated in the North Sea Cases: "With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that . . . a very widespread and representative participation in the convention might suffice of itself" North Sea Continental Shelf Cases, 1969 I.C.J. 42.

juvenile offenders are clear and unambiguous.

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War has been ratified by 161 nations. 13/ It provides in pertinent part:

In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offense.

Article 6(5) of the International Covenant on Civil and Political Rights, which has been ratified by eighty-six nations of the world, including most of

13/ 247 International Review of the Red Cross 257 (July/Aug. 1985). This is the number of parties as of December 31, 1984.

Western Europe and Canada, and signed by another seven, 14/ reads:

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

The prohibition against the execution of juvenile offenders in the American Convention on Human Rights, which has been ratified by nineteen American States and signed by an additional three, 15/ is found at Article 4(5):

Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

14/ Multilateral Treaties Deposited with the Secretary General of the U.N. at 124, U.N. Doc. ST/LEG/SER. E/3 (1985). This is the number of ratifications as of December 31, 1984.

15/ Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OEA/Ser. L/V/II, 65, Doc. 6, July 1, 1985, at 63.

Under both the International Covenant on Civil and Political Rights (Article 4(2)), and the American Convention on Human Rights, (Article 27(2)) the prohibition against imposition of the death penalty on juvenile offenders admits of no derogation. ^{16/} Unquestionably, these treaty prohibitions provide important and authoritative evidence of the customary norm against the execution of juvenile offenders. Records of the debates surrounding the development of the conventions and other indications of opinio juris found in the travaux preparatoires of these conventions demonstrate that their prohibitions against these executions are

^{16/} Likewise, under Article 3 of Protocol No. 6 to the European Convention on Human Rights, supra note 10, no derogation from the Protocol is allowed nor may reservations in respect of the Protocol be made under its Article 4.

in fact codifications of customary international law.

- a. The Fourth Geneva Convention Relative to the Protection of Civilians in Time of War

The Fourth Geneva Convention, signed in 1949, marked the initial stages of development for the customary international norm prohibiting the execution of juvenile offenders. This Convention has its origins in the Draft Convention for the Protection of Civilian Persons in Time of War, approved by the XVIIth International Red Cross Conference in August of 1948. ^{17/} Article 59 of this draft read: "The death penalty may not be pronounced against a protected

^{17/} Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, n.d., Vol. I, at 113.

person under eighteen years for any offense whatsoever." 18/

The Geneva Conventions, of course, apply principally to periods of international armed conflict and Article 68 forbids the execution of both civilians and military personnel no longer in combat who committed offenses prior to the age of eighteen. If nearly all the nations of the world, including the United States, have agreed to such a norm in periods of international armed conflict, the norm protecting juvenile offenders from execution ought to apply with even greater force during peacetime.

b. The International Covenant on Civil and Political Rights

During the debates surrounding the adoption of Article 6 of the

18/ Id. at 123.

International Covenant, there was no opposition to the view that permitting executions of juvenile offenders was contrary to human rights principles. 19/ The travaux reveal that the drafters of Article 6 believed that the prohibition against juvenile executions represented a consensus of nations. 20/

Significantly, the travaux make clear that the Article 6(5) prohibition was no more than the codification of an already existing binding norm. 21/ The U.N. General Assembly resolution which recognized that Article 6 of the International Covenant constitutes a "minimum standard" for all Member States,

19/ Hartman, supra note 1, at 671-72.

20/ Id. at 672 and n.64, and citations noted therein.

21/ Id.

not only ratifying states, 22/ also evidences State practice supporting the position that the prohibition against juvenile executions is customary international law.

c. The American Convention on Human Rights

The draft proposal of Article 4(5) was patterned after the International Covenant's prohibition on execution of juvenile offenders. 23/ Drafters of the Convention settled upon this formula, recognizing that total abolition of the death penalty was not possible in the context of the Convention.

22/ Id. at 681 n.94; G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980). Although the United States did not participate in the Article 6 debates, it did support this General Assembly Resolution.

23/ Hartman, supra note 1, at 672-73 n.66, and sources cited therein.

Hence, the American Convention, the International Covenant on Civil and Political Rights, and the Fourth Geneva Convention, with their accompanying statements regarding pre-existing customary law, 24/ provide strong evidence that there exists a high degree of consensus among a large number of

24/ Other evidence that a customary law norm exists includes the action of the U.N. Economic and Social Council (ECOSOC) which adopted, pursuant to a resolution, safeguards relating to the death penalty, one of which was a prohibition against the execution of persons who committed crimes below the age of 18 years. E.C.S. Res. 1984/50, U.N. ESCOR Supp. (No. 1), at 33, U.N. Doc. E/1984/84 (1984).

Moreover, in September of 1985, the Seventh U.N. Congress on the Prevention of Crime and Treatment of Offenders adopted Resolution No. 15, endorsing the ECOSOC safeguards and urging all states retaining the death penalty to implement them. The U.S. also consented to this resolution. Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (26 August to 6 September 1985) at 86-87, U.N. Doc. A/CONF.121/22 (1985).

nations that executions of juvenile offenders are forbidden.

2. National Laws and Practice

Further evidence of State practice appears in the national laws of over eighty nations, including almost all Western European countries, which have either abolished the death penalty or forbidden it for certain offenses and for certain offenders, including juveniles. Significantly, these nations range widely in political, religious and cultural tradition. 25/

Recent data compiled by Amnesty International reveals that twenty-eight countries have completely abolished the death penalty while eighteen additional countries provide for the death penalty only for exceptional crimes, such as

25/ Hartman, supra note 1, at 666, and n.44.

crimes under military law, or for crimes committed under exceptional circumstances, such as wartime. 26/ Other studies show that, among the countries for which data was reported, forty-one of the retentionist countries had statutory provisions exempting juveniles from the death penalty, five of the listed countries being Member States of the OAS. 27/

Even in the United States, laws in various jurisdictions which retain the death penalty nonetheless recognize that

26/ Amnesty International Document ACT 05/19/85, The Death Penalty List of Abolitionist and Retentionist Countries (June 1985).

27/ Hartman, supra note 1, at 666 n.44. The data used by this scholar was compiled based on information from the State Department, the United Nations and Amnesty International. The author acknowledges that data is often incomplete and not always perfectly accurate. Id. at 667.

special considerations apply to juvenile offenders with at least twenty-one states setting a minimum age for imposition of the death penalty. 28/ This practice is underscored by the declarations of various prestigious United States legal bodies, including the American Law Institute and the American Bar Association, which have publicly opposed execution of persons who committed crimes under the age of eighteen. 29/

28/ V. Streib, Minimum Statutory Ages for the Death Penalty (October 1, 1985) (unpublished memorandum). Nine require that the minimum age be at least 18 (including the recent addition of New Jersey, Indiana and Maryland). Twelve additional jurisdictions without a minimum age requirement expressly provide for age as one of the mitigating factors in imposing the death sentence. Id.

29/ American Law Institute Model Penal Code § 210.6(1)(d) (Proposed Official Draft, 1962); § 210.6, Comment, 1331 Official Draft and Revised Comments (1980); American Bar Association Report No. 117A, approved August 1983.

Thus, the practice of nations, when considered along with widely ratified human rights treaties, evidences an abhorrence of the imposition of the death penalty upon juvenile offenders which rises to the level of a customary norm of international law. 30/

30/ In a recent decision in a case involving the issue of the execution of juvenile offenders the United States Inter-American Commission on Human Rights concluded that the United States was violating its international legal obligations by permitting the execution of juvenile offenders. IACHR Resolution 3/87, case No. 9647 (Roach & Pinkerton v. United States), OEA Ser. L/V/II 69, Doc. 17, paras. 64-65 (March 27, 1987). The Commission concluded that the execution of "children" is prohibited by international law. Id. at para. 56. However, it also stated, in dicta, that "there does not now exist a norm of customary international law establishing eighteen to be the minimum age for imposition of the death penalty." Id. at para. 60. Amicus submits that the execution of Thompson, who was fifteen at the time he committed the crime for which he was sentenced to death, would violate the principle found by the Commission.

C. The United States Does Not Qualify As A Persistent Objector To The International Norm Prohibiting The Execution Of Juvenile Offenders.

A State may prevent itself from becoming bound by a rule of customary international law if: (A) the State mounts an explicit and disciplined opposition to the coalescing norm; 31/ and (B) the State has maintained consistent opposition since the rule's formation. 32/ The United States, however, has never affirmatively nor openly opposed the formation of the

31/ Hartman, supra note 1 at 686 n.113; Schacter, "Nature and Process of Legal Development in International Society," in Structure and Process of International Law, 745, 779 (1983); Stein, The Approach of the Different Drummer: The Principle of Persistent Objector in International Law, 26 Harv. Int'l. L. J. 457, 479 (1985).

32/ Norwegian Fisheries Case, (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Judgment of December 18); Akehurst, supra note 7.

customary international norm prohibiting the execution of juvenile offenders and is, therefore, bound by that rule.

To qualify as a persistent objector to a customary international norm, a State must show that the rule in question has never applied to it because of its "open dissent during the formation of the rule prior to its crystallization." 33/ The International Court of Justice has ruled that a State which unequivocally and consistently manifested a refusal to accept a rule from the moment of creation would qualify as a persistent objector. 34/ One

33/ Schacter, supra note 31, at 779 (emphasis added).

34/ Brownlie, Principles in Public International Law 11 (1979), citing Norwegian Fisheries Case, supra note 32, at 131 (emphasis added), in which the Court ruled that Norway would qualify as

[Footnote continued]

scholar described the criteria for persistent objection as follows:

Passive failure to bring domestic law into conformity with established international standards should not be accepted as adequate protest A dissenting state, to release itself from the binding force of a developing customary rule of international law, has an obligation to mount explicit and principled opposition to the coalescing norm, or it will find itself authoritatively bound to the international standard. 35/

There is no evidence pointing to an unequivocal manifestation of United States' opposition to the customary international norm prohibiting the execution of juveniles.

34/ [Footnote continued]

a persistent objector to the rule prohibiting the enclosure of bays by baselines exceeding ten miles in length because the government had always opposed the rule.

35/ Hartman, supra note 1, at 686 n.113 (emphasis added).

The formation of the norm prohibiting the execution of juvenile offenders commenced with the Fourth Geneva Convention and has been recognized in the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the recent proposed draft of the Convention on the Rights of the Child, the Beijing Rules on the Minimum Standards for the Administration of Juvenile Justice, and the practice of nations. The United States voiced no opposition to the rule prohibiting the imposition of the death penalty on juvenile offenders during the drafting stages of four of the five international instruments identified above. The few equivocal statements made by United States' officials do not rise to the level of explicit and consistent protest to the formation of the customary

international rule against the execution of juvenile offenders.

1. Article 68, para. 4 of the Fourth Geneva Convention

The United States signed and ratified the Fourth Geneva Convention without asserting any opposition to Article 68, para. 4. 36/ The only statement made by the United States regarding Article 68, para. 4 of the final version came during a Committee meeting at the Diplomatic Conferences in Geneva. The United States delegate stated

36/ The United States attached an unrelated reservation to Article 68(2) which read:

The United States reserves the right to impose the death penalty in accordance with provisions of Article 68, paragraph 2, without regard to whether offenses referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins.

the abolition of the death penalty in the case of protected persons under 18 years of age was a matter which called for very careful consideration before such a sweeping provision was adopted. 37/

This statement, however, does not constitute an unequivocal and principled statement of opposition. The United States never made any reservation whatsoever to this paragraph of the Convention. Moreover, after Article 68, para. 1, was sent back to the Drafting Committee for revision, United States delegate McCahon expressed support for the prohibition on the grounds that "the test reduced the number of cases in which

37/ Comment by Mr. Ginnane, in 19th Mtg of Committee III, May 19, 1949, in Final Report of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, n.d. Vol. II, § A, at 673.

the death penalty could be imposed." 38/
During the remainder of the conference,
the United States delegation focused on
paragraph 2 of Article 68, but never
again mentioned the provision prohibiting
the execution of those under eighteen at
the time of their offense. On August 3,
1949, Article 68 as a whole was adopted
by thirty-three votes to five, with five
abstentions. 39/ Thus, in the earliest
stages of its formation, the United
States failed to mount any unequivocal
opposition to the rule excluding juvenile
offenders from punishment by death.

38/ Comment by Mr. McCahon in 47th Mtg,
Committee III, July 14, 1949, id., at
789.

39/ 27th Plenary Mtg, id., Vol. II, § B,
at 431.

2. Article 6(5) of the International Covenant

The United States took no position on the substance of the death penalty limitations in Article 6(5) of the International Covenant because it declined to participate in the crucial 1957 Third Committee debates regarding the drafting of Article 6 of the International Covenant. 40/ Nevertheless, the United States representative eventually voted in favor of adoption of the International Covenant in 1966 without expressing concern over Article 6(5). 41/ The United States subsequently sponsored a United Nations

40/ Hartman, supra note 1, at 684.

41/ V. Bite, The United States and International Human Rights Treaties: A Summary of Provisions and Status in the Ratification Process, Foreign Affairs and National Defense Division, Congressional Research Service Report No. 83-175 F at 17 (1983).

General Assembly Resolution that recognized Article 6 of the International Covenant as expressing a "minimum standard" for all states. 42/

The International Covenant was signed by President Carter on October 5, 1977, and still no opposition was raised to Article 6(5). 43/ President Carter then submitted the International Covenant to the Senate in 1978. 44/ At that time the President transmitted a memorandum from the State Department proposing a number of reservations and understandings including the statement:

The United States reserves the right to impose capital punishment on any person duly convicted under existing or

42/ G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980).

43/ V. Bite, supra note 47, at 17.

44/ Department of State Bulletin, January 16, 1977 at 106.

future laws permitting the imposition of capital punishment.

This proposed reservation is insufficient as an objection to the international customary rule prohibiting the execution of juvenile offenders for three reasons. First, the reservation has never been presented to the international community. Because the Senate has yet to act on the President's recommendations, the proposed reservation by former President Carter has an ambiguous status as merely a proposal for consideration. Second, the proposed reservation was suggested twelve years after the International Covenant was adopted by the General Assembly, and so fails to satisfy the requirement that the opposition be manifested during the early days of the rule's formation. Third, the wording of the reservation does not meet the test of an explicit and principled

manifestation of refusal to follow the international norm.

Furthermore, the State Department specifically denied that the proposed reservation applied to juvenile offenders or pregnant women. The State Department explained to a Senate hearing that the purpose of the reservation to Article 6(5) of the International Covenant

is to avoid the assumption of an international obligation to meet certain standards which the United States domestic law does not currently meet. Its purpose was certainly not the preservation of any right to execute children or pregnant women, something never done in the United States. 45/

45/ International Human Rights Treaties: Hearings before the Committee on Foreign Relations; 96th Cong., 1st Sess. ct. 1, 55 (1979). Response by the State Department to the "Critique of Reservations to International Human Rights Covenants" by the Lawyers' Committee for International Human Rights. This statement is now inaccurate since three juvenile offenders have been executed in this country in recent years.

This denial by the State Department clearly undercuts any claim that the United States has persistently objected to the customary norm prohibiting the execution of persons younger than eighteen at the time of the offense.

3. Article 4(5) of the American Convention

United States representatives to the 1969 San Jose Conference apparently acquiesced in the drafting of Article 4 of the American Convention, as no evidence exists to prove otherwise. Based on its comments in the travaux preparatoires, the United States' delegation does not appear to have opposed per se the notion that the execution of juvenile offenders should be prohibited. Rather the delegation seems to have been more concerned that setting specific age limits on the imposition of the death penalty did not adequately take

into account the "already apparent" trend towards gradual abolition of the death penalty. The United States delegation stated at the time of the drafting of the convention:

The proscription of capital punishment within arbitrary age limits presents various difficulties in law, and fails to take account of the general trend, already apparent, for the gradual abolition of the death penalty For this reason we believe the text will be stronger and more effective if this paragraph is deleted. 46/

President Carter signed the American Convention on June 1, 1977, with no comment regarding the provision prohibiting the execution of juvenile

46/ 2 Buergenthal and Norris "Observations and Proposed Amendments to the Draft of the Inter-American Convention on Protection of Human Rights," Human Rights: The Inter-American System, Booklet 13, at 152 (1982) (emphasis added).

offenders. 47/ The reservation proposed by the State Department to Article 4(5) of the American Convention, similar to the proposed reservation to Article 6(5) of the International Covenant, is insufficient to support a contention that there has been a pattern of persistent objection to this customary international norm. 48/

47/ V. Bite, supra note 41, at 77.

48/ The Inter-American Commission in its decision in Case No. 9647, supra note 32, states that "since the United States has protested the norm, it would not be applicable to the United States should it be held to exist." Id. at para. 54. The only evidence of a United States protest of the norm is the proposed reservation transmitted to the Senate when the American Convention was submitted for ratification. However, as stated above, this internal transmission by the Executive Branch to the Legislative Branch simply cannot qualify as evidence of a persistent objection to a norm sufficient to release the United States from an obligation to comply with the norm.

4. Article 19(2)(b) of the
Proposed Draft Convention
on the Rights of the Child

Article 19(2)(b) of the proposed Convention on the Rights of the Child, formulated by an informal working party, reads:

Capital punishment or life imprisonment without possibility of release is not imposed for crimes committed by persons below eighteen years of age. 49/

The United States representative placed on record a reservation to the age limit, but this reservation was made in March of 1986. 50/ It came too late to release the United States from the binding effect of the customary norm

49/ Report of the Working Group on a Draft Convention on the Rights of the Child, 42 UN ESCOC Commission on Human Rights (Agenda Item 13) U.N. Doc. E/CN.4/1986/39 (1986).

50/ Id. at 24.

prohibiting the imposition of the death penalty on juvenile offenders.

In addition, the reservation was not sufficiently explicit to relieve the United States of its international legal obligations. The United States representative voiced disagreement with the proposal to adopt eighteen as the age limit, as previously accepted in various international instruments. 51/ She did not disagree with the general proposition that the death penalty should be abolished in the case of juvenile offenders. Furthermore, the United States representative specifically stated that she would not insist on any changes and block consensus on Article 19(2)(b). 52/ These statements hardly

51/ Id.

52/ Id.

qualify as "unequivocal" and "explicit" statements of opposition. While the United States reservation may operate in regards to this particular international instrument, it cannot operate in regards to the customary international norm.

As has been demonstrated, the United States does not qualify as a persistent objector to the international norm prohibiting the imposition of the death penalty for crimes committed by children below the age of eighteen and, consequently, is bound by it. The United States failed to oppose this customary norm during its early days of formation and there has been no consistent United States opposition to this norm since it was established.

II. UNDER TREATIES IT HAS SIGNED BUT NOT RATIFIED, THE UNITED STATES HAS LEGAL OBLIGATIONS WHICH ARE BREACHED WHEN JUVENILES ARE EXECUTED

As discussed above, the United States has signed the International Covenant and the American Convention, both of which forbid the execution of juvenile offenders. Amicus submits that as a result of having signed these treaties, the United States incurred legal obligations which are violated when juvenile offenders are executed.

Article 18 of the Vienna Convention on the Law of Treaties (the "Vienna Convention") 53/ provides that:

[a] state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

53/ U.N. Doc. A/CONF. 39/27 (1969), reprinted at 8 I.L.M. 679 (1969), transmitted to the Senate for advice and consent to ratification on Nov. 21, 1971, but not yet ratified.

a. it has signed the treaty. . . subject to ratification. . . until it shall have made its intention clear not to become a party to the treaty.

The United States has accepted the Vienna Convention as "the authoritative guide to current treaty law and practice," 54/ and customary international law is to the same effect. 55/

The Restatement (Revised) of the Foreign Relations Law of the United States incorporates Article 18 of the Vienna Convention into § 312(3). As an

54/ Letter of Submittal to the President, S. Exec. Doc. L., 92nd Cong., 1st Sess. 1 (1971). See also Interpretation of Treaties, 75 A.J. Int'l. Law 147 (1981).

55/ International Law Commission, Report to the General Assembly (1966), 2 Ybk. Int'l. L. Comm'n. 172, 202. See also McNair, The Law of Treaties (1961) at 199; Anzilotti, Courts de droit international (Gidel trans. (1929)) at 372. Customary law is binding on the United States. The Paquete Habana, supra.

example of an act which would "defeat the object and purpose" of a treaty, the Restatement discusses a test of a new nuclear weapon in contravention of a provision prohibiting such tests in a signed but unratified treaty. The effects of such a test, which would release significant radioactivity into the atmosphere, would be irreversible, since the atmospheric contamination could not be called back. ^{56/} Since the injury is irreversible, the Restatement concludes, such an act would defeat the object and purpose of the treaty in the sense forbidden by the Vienna Convention and customary international law.

Similarly, a life taken by execution is irretrievable. Each time

^{56/} Restatement (Revised) of the Foreign Relations Law of the United States, 2 A.L.I. Tent. Draft No. 6, § 312, Comment i (1985).

the United States permits the execution of a juvenile offender, the purpose and object of the signed but unratified human rights treaties are defeated in the sense proscribed by the Vienna Convention and the Restatement. Thus, legal obligations binding on the United States are breached.

III. EVEN IF THE COURT HOLDS THAT THE STATES ARE NOT BOUND BY THE CUSTOMARY NORM PROHIBITING THE EXECUTION OF JUVENILE OFFENDERS, THE INTERPRETATION OF THE EIGHTH AMENDMENT SHOULD BE INFORMED BY THAT NORM

In interpreting the Eighth Amendment's prohibition against "cruel and unusual punishment", the Court has taken account of "the climate of international opinion concerning the acceptability of a particular punishment." Coker v. Georgia, 433 U.S. 584 (1976). The Court considered international practice in Trop v. Dulles, 356 U.S. 86 (1958), in holding that loss

of nationality was an excessive, and therefore unconstitutional, sanction for desertion from the armed forces. Id. at 102. In Coker, supra, the death penalty for rape was held to be unconstitutionally excessive punishment; the Court noted United Nations documents indicating that only three out of sixty nations surveyed retained capital punishment in rape cases. Id., at 597, n.10. Recently, the Court again referred explicitly to "international opinion" in determining that the death sentence violated the Eighth Amendment when imposed on an offender who had not intended to kill his victim. Enmund v. Florida, 458 U.S. 782, 796 (1982).

There exists a well-developed, unequivocal customary international norm prohibiting the execution of juvenile offenders. Whatever the Court's conclusion regarding the binding nature

of that norm on the several states, amicus submits that, at a minimum, the Court should take account of that norm in giving meaning to the Eighth Amendment's prohibition against cruel and unusual punishment.

CONCLUSION

The practice of executing juvenile offenders is one that has clearly been rejected by the majority of the nations of the world. The multilateral treaties discussed herein, the travaux preparatoire related to those treaties, the domestic laws of numerous nations, the writings of experts and the resolutions of the United Nations all evidence a newly emerged norm of customary international law that is binding on the United States and on the several states under the Supremacy Clause of the Constitution.

Even if the Court does not find that such a binding norm exists, the Court should consider the almost universal international abhorrence to the execution of juvenile offenders in construing the Eighth Amendment's prohibition against cruel and unusual punishment in this case.

For all of these reasons, amicus respectfully urges this Court to reverse the decision of the Oklahoma Court of Criminal Appeals below.

Respectfully
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,

Petitioner,

— v. —

STATE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

**BRIEF OF THE AMERICAN SOCIETY
FOR ADOLESCENT PSYCHIATRY AND
THE AMERICAN ORTHOPSYCHIATRIC
ASSOCIATION AS AMICI CURIAE IN
SUPPORT OF PETITIONER**

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Question Presented for Review

1. Is the execution of an individual who was under the age of 18 at the time he or she committed a capital offense cruel and unusual punishment in violation of the Eighth Amendment?

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INTEREST OF AMICI CURIAE

The American Society for Adolescent Psychiatry and the American Orthopsychiatric Association file this brief as *amici curiae* in support of petitioner by written consent of all parties, pursuant to Rule 36.2 of the Rules of this Court. The parties' letters of consent are on file with the Clerk.

The American Society for Adolescent Psychiatry ("ASAP") (Doris S. Soghor, M.D., President) was founded in 1967 and today has approximately 1400 members. ASAP provides a national forum for adolescent psychiatry and promotes the exchange of psychiatric knowledge about adolescents. Since its founding, ASAP has supported research on the normal development, as well as the psychopathology and treatment, of adolescents, helped to broaden knowledge and understanding of the various factors that may influence adolescent development and substantially improved the psychiatric community's ability to recognize and diagnose psychiatric problems common in adolescents. One half of ASAP's members are child psychiatrists, while the remaining number are general psychiatrists and psychoanalysts who maintain an active professional interest in adolescents. Its members work with adolescents in hospitals, schools and psychiatric clinics around the country as well as within the nation's juvenile court system.

The American Orthopsychiatric Association ("Ortho") (Bert Pepper, M.D., President) was established in 1924 and has traditionally been concerned with the problems, causes, treatment and prevention of psychiatric disturbances. It is an organization comprised of more than 10,000 members representing a variety of mental health-related professions — psychiatry, psychology, psychiatric nursing, social work, education and the law — including experts in adolescent development. With its broad-based membership, Ortho has consistently helped to shape public policy in the mental health and human development field from varying professional perspectives.

Amici sponsor a wide array of educational programs for their members and other mental health professionals. In addition each *amicus* publishes a scientific journal.

Amici are organizations with extensive background and experience in adolescent development. This brief is intended to

provide the Court with relevant data that will enable it to judge the critical issue herein effectively, fairly and with greater knowledge of adolescents' developmental capabilities. Adolescents are developmentally different from adults. Accordingly, *amici* strongly urge the Court to spare adolescents the imposition of capital punishment.

SUMMARY OF ARGUMENT

The law has historically recognized that adolescents differ intellectually and emotionally from adults, and therefore deserve to be judged and treated differently. This view is confirmed by a vast body of clinical research and literature. Psychiatrists and psychologists have demonstrated that adolescents have not yet developed many of the psychological, cognitive, and emotional characteristics of mature adults. Adolescents tend to be less mature, more impulsive, and less capable of controlling their conduct and thinking in terms of long-range consequences. Adolescence is a stage of human development in which one's character and moral judgment are incomplete and still undergoing formation. An adolescent's character structure is more flexible than an adult's and remains open to major modifications. (Point I)

Adolescents who commit capital offenses typically suffer from a variety of serious disturbances which inhibit their natural development. They come from chaotic families, have been exposed to extreme violence, suffer severe cognitive limitations, and frequently have long-standing psychiatric problems. These factors tend to exacerbate the existing vulnerabilities of youth and place an adolescent at extreme risk for seriously violent behavior. The findings of a recently completed study of persons on death row who committed capital offenses in their adolescence are consistent with this general understanding about youthful offenders. William Wayne Thompson, petitioner herein, who was one of the subjects of that study, exhibited the characteristics typical of this distinct subgroup. (Point II)

The Eighth Amendment forbids the infliction of cruel and unusual punishment. Punishment is inherently cruel if it is excessive. It is excessive if it is disproportionate or fails to make

any measurable contribution to acceptable goals of punishment. As applied to adolescents, capital punishment is both disproportionate and makes no measurable contribution to acceptable goals of punishment. It is disproportionate as applied to youthful offenders because youths are less culpable than adults for their offensive acts given their incomplete psychological and emotional development. The death penalty is also contrary to the only legitimate aims of punishing the young: rehabilitation and treatment. Finally, in light of contemporary human understanding about adolescents generally and adolescents who commit capital offenses in particular, the death penalty as applied to adolescents is contrary to contemporary standards of decency. Execution of adolescents is therefore inherently cruel in violation of the Eighth Amendment. (Point III)

ARGUMENT

. I

PSYCHIATRISTS, PSYCHOLOGISTS AND OTHER CHILD DEVELOPMENT EXPERTS RECOGNIZE THAT ADOLESCENCE IS A TRANSITIONAL PERIOD BETWEEN CHILDHOOD AND ADULTHOOD IN WHICH YOUNG PEOPLE ARE STILL DEVELOPING THE COGNITIVE ABILITY, JUDGMENT AND FULLY FORMED IDENTITY OR CHARACTER OF ADULTS

The law has always recognized that adolescents differ intellectually and emotionally from adults, and therefore deserve to be judged and treated differently.¹ As this Court said:

[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years,

¹ Examples of this different treatment include limitations on youths' right to vote, contract, serve as jurors, purchase liquor, marry, drive motor vehicles, enlist in the armed services, or accept employment. See generally F. Zimring, *The Changing Legal World of Adolescence* (1982).

generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.

Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982), quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). This view is confirmed by a vast body of clinical research and literature.²

Psychiatrists, psychologists and other child development experts have demonstrated that adolescents are at a stage of development in which they lack the cognitive ability,³ judgment and fully-formed identity or character of adults. "[A]dolescence is the transitional period between childhood and adulthood. It begins with the biological events of puberty and continues through a complex series of psychological and sociocultural events and influences to the establishment of an independently functioning person."⁴

An adolescent's intellectual growth is incomplete and his or her reasoning skills and logic are immature. From a cognitive perspective, adolescents are in the process of moving from "concrete operational thought" to "formal operational thought."⁵ An

² See, e.g., Brunstetter & Silver, *Normal Adolescent Development*, in 2 *Comprehensive Textbook of Psychiatry* 1608 (H. Kaplan & B. Sadock 4th ed. 1985); Hamburg & Wortman, *Adolescent Development and Psychopathology*, in 2 *Psychiatry* ch. 4 (J. Cavenar ed. 1985); *Handbook of Clinical Child Psychology* (C. Walker & M. Roberts eds. 1983); M. Lewis, *Clinical Aspects of Child Development* (2d ed. 1982); S. Ambron, *Child Development* (3d ed. 1981); P. Mussen, J. Conger & J. Kagan, *Child Development and Personality* (5th ed. 1979); M. Rutter, *Changing Youth in a Changing Society* (1979); Graham & Rutter, *Adolescent disorders*, in *Child Psychiatry: Modern Approaches* 407 (M. Rutter & L. Hersov eds. 1977).

³ Cognition refers to the processes involved in perception, memory, reasoning, reflection, and insight. P. Mussen, J. Conger & J. Kagan, *supra* note 2, at 233-34.

⁴ Brunstetter & Silver, *supra* note 2, at 1608. The period of adolescence encompasses approximately ages 11 to 18. See generally Hamburg & Wortman, *supra* note 2, at 5-8.

⁵ Cognitive capacity develops in a sequence of stages. Jean Piaget is credited with documenting this growth and providing the terminology for these stages.
(Footnote Continued)

adolescent begins to consider the possible as well as the actual.⁶ These new cognitive skills develop continuously and "most adolescents cannot be shown to have reached the stage of formal reasoning by the end of high school."⁷ Formal, abstract reasoning is a complex ability that is influenced by training and experience.⁸ Therefore, although adolescents begin to acquire a broader awareness, they lack the judgment necessary to choose carefully among various possibilities and to appreciate the future consequences of their actions.

Behaviorally, the effects of an adolescent's developing cognitive ability include increased impulsiveness, experimentation, and risk-taking. An adolescent's newly forming capacity to reason abstractly, coupled with his or her "fascination with the possible," results in a desire to explore various behaviors.⁹ However, because of an adolescent's limited experience and lack of ability to assess future consequences, he or she is unable to conceptualize realistically the potential negative outcomes of certain actions. This difficulty contributes to a young person's feelings of invulnerability to personal risk.¹⁰ Hence adolescents often engage in alcohol and drug use/abuse, sexual experimentation, reckless use of motor vehicles, and other potentially destructive behaviors.¹¹

See B. Inhelder & J. Piaget, *The Growth of Logical Thinking from Childhood to Adolescence* (1958); H. Ginsburg & S. Offer, *Piaget's theory of intellectual development* (1969).

⁶ See, e.g., S. Ambron, *supra* note 2, at 432-33.

⁷ Brunstetter & Silver, *supra* note 2, at 1608.

⁸ *Id.*

⁹ Irwin & Millstein, *Biopsychosocial Correlates of Risk-Taking Behaviors*, J. Adolescent Health Care, Vol. 7, No. 6S, 82S, 87S (November 1986 Supplement).

¹⁰ *Id.* at 87S.

¹¹ *Id.* at 82S.

Furthermore, researchers studying adolescent suicide have documented that adolescents tend not to appreciate fully the possibility, and finality, of death.¹² If they consider death at all, it is viewed as something that happens to elderly people, not teenagers. Many adolescents who attempt suicide may not really believe that death will occur. In fact, they may view a suicide attempt as nothing more than a form of running away, without any consideration of their own mortality.¹³

Adolescent cognitive development is also characterized by a high degree of egocentrism. An adolescent "assumes that other people are as obsessed with his behavior and appearance as he is himself. It is this belief that others are preoccupied with his appearance and behavior that constitutes the egocentrism of the adolescent."¹⁴

Moreover, adolescents come to regard themselves, and their own feelings, as particularly special and unique. This belief further contributes to an adolescent's lack of understanding regarding death. An adolescent's sense of specialness becomes a conviction of his or her immortality.¹⁵ Adolescent egocentrism thus results in a general impairment of adolescent judgment.

Adolescence is also a period during which youths struggle to develop a certain measure of independence and personal identity or character.¹⁶ An adolescent engages in this developmental task

¹² Sheras, *Suicide in Adolescents*, in *Handbook of Clinical Child Psychology* 759, 769-70 (C. Walker & M. Roberts eds. 1983).

Adolescent suicide and suicide pacts among teenagers have become a growing national concern. See, e.g., Barron, *Suicide Rates of Teenagers: Are Their Lives Harder to Live?*, N.Y. Times, April 15, 1987, § C, at 1, col. 5. Suicide is reported to be the third leading cause of death for teenagers. Sheras, *supra* at 769.

¹³ Sheras, *supra* note 12, at 769.

¹⁴ Elkind, *Egocentrism in Adolescence*, 38 *Child Development* 1025, 1029-30 (1967) (emphasis in original deleted).

¹⁵ *Id.* at 1030-31.

¹⁶ See generally E. Erikson, *Identity: Youth and Crisis* (1968); E. Erikson, *Childhood and Society* (1963); P. Mussen, J. Conger & J. Kagan, *supra* note 2.

in a number of ways,¹⁷ such as trying out various roles, separating from his or her parents, and seeking affirmation from a peer group. Throughout this process, adolescents remain emotionally dependent on other people.¹⁸ They are vulnerable to influences from both parents and peers, and are less capable of independent, self-directed action than adults. The character structure of adolescents, though developing, remains in flux and does not represent the final level of maturity found in adults. Adolescents are by nature capable of significant and spontaneous change.¹⁹

Normal adolescence is no longer considered necessarily a time of extreme emotional turmoil.²⁰ Adolescence is, however, generally characterized by emotionality rather than rationality.

¹⁷ It is understandable that many adolescents must struggle to develop a personal identity. In addition to the changes adolescents experience in how they think, they also undergo vast physiological and hormonal changes. Adolescents are faced with rapid increases in height, changing bodily dimensions, and physical and psychological changes related to sexual maturation. All of these changes threaten an adolescent's sense of self. See M. Lewis, *supra*, note 2, at 263-66.

¹⁸ "[T]he transition from childhood into adolescence is marked more by a trading of dependency on parents for dependency on peers rather than straightforward and unidimensional growth in autonomy." Steinberg & Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 *Child Development* 841, 848 (1986).

¹⁹ For example, young people can later overcome features of an antisocial personality that appear during adolescence. For this reason the diagnosis of Antisocial Personality cannot be applied until an individual has reached 18 years of age. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 319 (3d ed. 1980).

²⁰ See, e.g., M. Rutter, *supra* note 2, at 235-38; Rutter, Graham, Chadwick & Yule, *Adolescent Turmoil: Fact or Fiction?*, 17 *J. Child Psychology & Psychiatry* 35 (1976); D. Offer & J. Offer, *From teenage to young manhood: a psychological study* (1975).

Daniel Offer's work has suggested that adolescents who experience the greatest inner turmoil are of lower socioeconomic status, and come from families with overt marital conflicts and a history of mental illness. See D. Offer, *The Psychological World of the Teenager* (1969).

Adolescents tend to show a special intensity of feeling and tend to seek out emotional experience. Moreover, it has been demonstrated consistently that "adolescents experience a greater fluctuation of mood than adults."²¹

Finally, adolescents lack the capacity for mature, principled moral judgment which is characteristic of normal adult thought. Moral judgment emerges through the maturation process as a result of cognitive and emotional growth and an adolescent's interaction with his or her environment. An adolescent lacks a fully formed value system against which to evaluate his or her behavior and decisions. "[L]arge groups of moral concepts and ways of thought only attain meaning at successively advanced ages and require the extensive background of social experience and cognitive growth. . . ."²²

Adolescents must undergo an array of significant changes prior to adulthood. Before these many developmental tasks are achieved, adolescents are vulnerable in a variety of ways. They have difficulty appreciating the future consequences of their acts, generally lack mature judgment, are easily influenced by family members and peers and often engage in experimentation and risk-taking. Adolescents tend to be guided by emotions rather than reason. Furthermore, adolescents lack a fully formed identity or character, and generally do not have the capacity for principled moral judgment.

Adolescence is a critical developmental stage through which young persons must pass prior to entering adulthood. The clinical literature confirms what we all generally know and what the law has always recognized — adolescents are not adults. Adolescents are less capable and less responsible than adults, and more in need of protection and support.

²¹ Hamburg & Wortman, *supra* note 2, at 11.

²² Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 *Vita humana* 11, 30 (1963). See also Kohlberg & Gilligan, *The Adolescent as a Philosopher: The Discovery of the Self in a Postconventional World*, *Daedalus* 1051 (Fall 1971); Kohlberg, *Development of Moral Character and Moral Ideology*, in *Review of Child Development Research* 383, 402 (M. Hoffman & L. Hoffman, eds. 1964).

II

ADOLESCENTS WHO COMMIT MURDER SUFFER FROM SERIOUS PSYCHOLOGICAL AND FAMILY DISTURBANCES WHICH EXACERBATE THE ALREADY EXISTING VULNERABILITIES OF YOUTH

Adolescents who commit murder typically suffer from a variety of serious disturbances which inhibit their natural growth and development. It is well established that these disturbances, acting in combination, exacerbate the already existing vulnerabilities of youth and place an adolescent at extreme risk for seriously violent behavior.²³

Psychiatrists and psychologists have learned that adolescents who commit murder frequently come from families that are extremely chaotic and fail to provide the necessary support and direction for their children.²⁴ Under some circumstances, especially those in which an adolescent kills family members, he or she may actually be responding to family pressure or implicit messages to do so.²⁵ Furthermore, adolescents who commit murder almost invariably have a family background that includes extreme physical abuse and intrafamily violence. Many homicidal adolescents have also been sexually abused.²⁶

²³ See generally Cornell, Benedek & Benedek, *Characteristics of Adolescents Charged with Homicide: Review of 72 Cases*, *Behavioral Sciences & the Law* Vol. 5, No. 1, at 11 (1987); Cornell, Benedek & Benedek, *Juvenile Homicide: Prior Adjustment and a Proposed Typology* (paper presented at the American Psychiatric Association Annual Meeting, Washington, D.C.) (1986); *The Aggressive Adolescent: Clinical Perspectives* (C. Keith ed. 1984); M. Rutter & H. Giller, *Juvenile Delinquency: Trends and Perspectives* (1983).

²⁴ See, e.g., Haizlip, Corder & Ball, *The Adolescent Murderer*, in *The Aggressive Adolescent: Clinical Perspectives* 126, 129-34 (C. Keith ed. 1984); M. Rutter & H. Giller, *supra* note 23, at 180-91; Corder, Ball, Haizlip, Rollins & Beaumont, *Adolescent Parricide: A Comparison with Other Adolescent Murder*, 133 *Am. J. Psychiatry* 957 (1976).

²⁵ See, e.g., Duncan & Duncan, *Murder in the Family: A Study of Some Homicidal Adolescents*, 127 *Am. J. Psychiatry* 74 (1971); Sargent, *Children Who Kill — A Family Conspiracy?*, 7 *Social Work* 35 (1962).

²⁶ See, e.g., Haizlip, Corder & Ball, *supra* note 24, at 130-34; Straus, *Domestic Violence and Homicide Antecedents*, *Bull. N.Y. Acad. Med.*, Vol. 62, No. 5, (Footnote Continued)

These young people then are often victims of, and witnesses to, significant violence during their childhood and adolescence. The violence is often sustained, repetitive, and characterized by extraordinary brutality and sadism.²⁷ Their family environment is one in which violence is portrayed as the ultimate problem-solver. The use of physical aggression is considered an acceptable way of dealing with others.²⁸

This systematic exposure to violence affects a young person in a number of ways. First, violence becomes a style of behavior against which a child or adolescent is apt to model his or her own behavior. Second, the persistent abuse engenders deep-seated feelings of rage which are often acted upon against other people.²⁹ Finally, a child who is physically battered can suffer significant trauma to the brain which results in increased impulsivity and volatility.³⁰

at 446 (1986); Straus, *Family Training in Crime and Violence*, in *Crime and the Family* 164 (A. Lincoln & M. Straus eds. 1985).

²⁷ See, e.g., Lewis, Shanok, Pincus & Glaser, *Violent Juvenile Delinquents: Psychiatric, Neurological, Psychological, and Abuse Factors*, 18 J. Am. Acad. Child Psychiatry 307, 315-18 (1979); Sendi & Blomgren, *A Comparative Study of Predictive Criteria in the Predisposition of Homicidal Adolescents*, 132 Am. J. Psychiatry 423 (1975).

²⁸ See, e.g., Straus, *Family Training in Crime and Violence*, *supra* note 26, at 182-84; Lewis, Shanok, Grant & Ritvo, *Homicidally Aggressive Young Children: Neuropsychiatric and Experiential Correlates*, 140 Am. J. Psychiatry 148 (1983).

²⁹ See, e.g., Straus, *Family Training in Crime and Violence*, *supra* note 26, at 182-84; Haizlip, Corder & Ball, *supra* note 24, at 130; Lewis, Shanok, Grant & Ritvo, *supra* note 28, at 152-53; Paperny & Deisher, *Maltreatment of Adolescents: The Relationship to a Predisposition Toward Violent Behavior and Delinquency*, *Adolescence*, Vol. 18, No. 71, at 499 (Fall 1983); Silver, Dublin & Lourie, *Does Violence Breed Violence? Contributions from a Study of the Child Abuse Syndrome*, 126 Am. J. Psychiatry 404, 409 (1969); see also M. Wolfgang & F. Ferracuti, *The Subculture of Violence: Towards an Integrated Theory in Criminology* 160 (1967) ("[A]ggression is a learned response, socially facilitated and integrated. . . .").

³⁰ See, e.g., Lewis, Moy, Jackson, Aaronson, Restifo, Serra & Simos, *Biopsychosocial Characteristics of Children Who Later Murder: A Prospective Study*, 142 Am. J. Psychiatry 1161, 1165-66 (1985); Lewis, Shanok, Grant & Ritvo, *supra* note 28, at 152-53; Lewis, Shanok, Pincus & Glaser, *supra* note 27, at 314; Bender, *Children and Adolescents Who Have Killed*, 116 Am. J. Psychiatry 510 (1959).

Adolescents who commit murder also frequently have severe cognitive limitations. They tend to be intellectually immature and educationally deficient. These adolescents have significant impairments in judgment and are unable to perceive the consequences of their actions. These cognitive limitations are often linked to learning disabilities and neurological damage. Homicidal aggression in adolescents is also strongly associated with psychiatric problems.³¹

Together, these factors — exposure to violence, cognitive limitations, and psychiatric problems — exacerbate the already existing vulnerabilities of normal adolescence. Added to a normal adolescent's generally limited ability to appreciate the consequences of his or her actions and to take into account societal values in choosing a course of action, an adolescent who kills is handicapped further by impairment in cognitive ability. Added to a normal adolescent's susceptibility to the influence of family members and peers, an adolescent who kills is surrounded by an atmosphere of violence, in which the norm not only tolerates but encourages violence and trivializes its consequences. And finally, added to the emotionality and egocentrism of adolescence, an adolescent who kills is often afflicted with neuropsychiatric disorders which further heighten already intensified emotions and which can create serious misperceptions concerning the relationship between himself or herself and the external world.

A. A Study of Juveniles on Death Row Confirms Their Seriously Impaired Development

In the only clinical study of individuals on death row in the United States who committed capital offenses when they were under the age of 18, researchers have found that as a group these persons suffer from the neuropsychiatric, psychoeducational and family disturbances generally characteristic of adolescents who commit homicide (the "Study").³²

³¹ See, e.g., Lewis, Shanok, Pincus & Glaser, *supra* note 27, at 313-18.

³² Lewis, Pincus, Bard, Richardson, Feldman, Pritchep & Yeager, *Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States* (Paper accepted for presentation at the 34th Annual Meeting of the American Academy of Child and Adolescent Psychiatry, October 1987). (Appendix) (References followed by "A" are to the Appendix).

(Footnote Continued)

The 14 subjects of this interdisciplinary study consisted of all adolescents sentenced to death in four states. They were selected for the study solely on the basis of their age at the time of the capital offense. They are therefore reasonably believed to be representative of the adolescent offender death row population as a whole. (3A)

The subjects were given comprehensive psychiatric, psychological, neurological, educational and electroencephalographic examinations. The psychiatric examination consisted of a thorough interview covering topics such as medical history, history of neuropsychiatric symptoms, and family and social history, including history of physical and sexual abuse. Careful mental status examinations³³ were performed. Detailed neurological histories were obtained by a psychiatrist and a neurologist. These histories included difficulties surrounding birth, head injury, illnesses or drug overdoses known to affect the central nervous system, loss of consciousness, fainting, blackouts or other lapses, seizures, and symptoms suggestive of psychomotor epilepsy. Additionally, any historical evidence of central nervous system trauma was corroborated through physical examinations, record reviews, and specialized tests such as the electroencephalogram. Finally, a standard neurological examination was conducted and a battery of psychological, neuropsychological, and educational tests was administered. (3A-6A)

The Study found serious and wide-ranging disturbances in *all* of the subjects. All 14 suffered head injuries during childhood,

The authors of the Study are: Dorothy Otnow Lewis, M.D., Professor of Psychiatry, New York University School of Medicine, Clinical Professor of Psychiatry, Yale University Child Study Center; Jonathan H. Pincus, M.D., Professor and Chairman of the Department of Neurology, Georgetown University; Barbara Bard, Ph.D., Professor of Special Education, Central Connecticut State University; Ellis Richardson, Ph.D., Research Associate Professor of Psychiatry, New York University School of Medicine; Marilyn Feldman, M.A. in Psychology; Leslie Prichep, Ph.D., Associate Professor of Psychiatry, New York University School of Medicine; and Catherine Yeager, M.A., Research Assistant, Department of Psychiatry, New York University School of Medicine.

³³ The mental status examination is a cross-sectional inventory of a patient's current behavior, symptoms, sensorium, and cognitive faculties. See Ginsberg, *Psychiatric History and Mental Status Examination*, in *1 Comprehensive Textbook of Psychiatry* 487 (H. Kaplan & B. Sadock 4th ed. 1985).

nine of which were severe enough to result in hospitalization, indentation of the cranium, or loss of consciousness. Furthermore, the neurological and electroencephalographic data revealed that nine had serious neurological abnormalities, including evidence of localized brain injury, a history of grand mal seizures,³⁴ major neurological abnormalities such as abnormal head circumference, and symptoms or electroencephalographic findings suggestive of a previously undiagnosed seizure disorder. (6A)

The Study also found that seven of the subjects were psychotic at the time of their evaluations and/or had been so diagnosed in earlier childhood. An additional four subjects displayed histories consistent with severe mood disorders. The three remaining subjects suffered from disturbed thinking, characterized by periodic paranoia. Thus, all 14 exhibited psychiatric disturbances. Seven suffered from psychiatric disturbances that first appeared in early or middle childhood. In all cases, psychopathology³⁵ antedated the crimes for which the subjects were sentenced to death. (6A-7A)

The psychoeducational testing done in this Study further indicates that at least nine of the subjects experienced significant brain impairment and lacked the ability to formulate abstract concepts. Moreover, 12 subjects had I.Q. scores below 90.³⁶ The Study concludes that the majority of these individuals have serious deficiencies in abstract reasoning and function well below the expected levels for their ages. (7A)

The Study reveals that these adolescents offenders had been repeatedly and brutally physically and sexually abused, often by more than one family member. Furthermore, alcoholism, drug

³⁴ Grand mal seizures are "characterized by loss of consciousness and tonic spasm of the musculature, usually followed by repetitive clonic jerking." *Stedman's Medical Dictionary* 475 (5th ed. 1982).

³⁵ Psychopathology refers to "disordered psychologic and behavioral functioning (as in a mental disease)." *Webster's Third New International Dictionary* 1833 (1968).

³⁶ An I.Q. score of 100 is considered average. A person with an I.Q. score below 90 falls into the bottom twenty-five percent of other individuals of the same age in the United States. See D. Wechsler, *The Wechsler Intelligence Scale for Children - Revised* 25 (1974); D. Wechsler, *The Wechsler Adult Intelligence Scale - Revised Manual* 27 (1980).

abuse, psychiatric treatment and psychiatric hospitalization were prevalent in the histories of their parents. (8A)

The Study concludes that individuals condemned to death in the United States for crimes committed in their youth are multi-handicapped. They generally have suffered serious central nervous system injuries, have suffered since early childhood from psychotic symptoms, and have been physically and sexually abused. These significant disturbances inhibit natural development, exacerbate the existing vulnerabilities of youth, and contribute to the violent behavior demonstrated by these adolescents. (8A)

The central nervous system injuries that these adolescents have experienced may contribute to their emotional instability, impulsivity, and difficulty in controlling aggressive behavior. Also, this type of brain injury may make these adolescents more vulnerable to the disorganizing effects of alcohol and drugs. The Study concludes that the ~~severe~~ cognitive impairment characteristic of these adolescents further compromises their ability to make mature judgments and to act in accordance with them. (8A-9A)

Furthermore, the physical and sexual abuse experienced by these adolescents contributes to their crimes. First, the multiple batterings suffered by these adolescents sometimes actually caused brain injury which would result in increased impulsivity. Second, the severe parental violence that they experienced functions as a model for their behavior. Third, the extreme, irrational brutality to which these adolescents are exposed engenders rage which is displaced onto other individuals in their environment. (9A)

Finally, the Study suggests that the multiple disturbances which contributed to the violent behavior that these adolescents displayed also contributed to the harshness of the sentences they received. According to the Study, these adolescents uniformly try to hide evidence of their cognitive deficits and psychotic symptomatology. (9A-10A) Similarly, they try to conceal or minimize their parents' brutality towards them, due to feelings of shame. (10A) It is ironic that the very factors which could function as mitigating circumstances instead remain hidden at the time of the sentencing. It is noteworthy that much of the clinical information revealed in this Study had apparently not been previously uncovered during the course of each individual adolescent's case.

The Study reports that of these 14 subjects "in only 5 cases were pretrial psychiatric or psychological examinations of any kind performed." (8A) "These 5 evaluations tended to be perfunctory and gave inaccurate and inadequate portrayals of the adolescents' neuropsychiatric and cognitive status." (10A) Only once was significant neuropsychiatric impairment reported. (8A) The Study states that the data obtained was only revealed in the course of lengthy, detailed, and comprehensive medical and psychological evaluations of the kind that simply are unavailable to adolescents charged with offenses punishable by death. (10A)

B. Petitioner Was a Subject of the Study and Exhibited the Same Serious Disabilities

Petitioner William Wayne Thompson was one of the subjects of the Study. He is typical in many ways of other homicidal adolescents, and exemplifies the psychological, educational and family disturbances found in the adolescents on death row as a group.

The only psychiatric or psychological evidence presented at petitioner's trial came from a clinical psychologist, Helen Klein, who was hired by the prosecution. Dr. Klein met with petitioner twice and produced a four and one-half page handwritten report. She then testified at the sentencing phase of petitioner's trial. Dr. Klein's testimony was cursory and speculative, and not tied to the information in her report. The gist of her testimony was that petitioner is an uncaring person who is incapable of change. She described petitioner as "an antisocial personality." (Tr. at 793.)¹⁷ As noted earlier, the standard diagnostic tool for mental disorders used by psychiatrists and psychologists requires that the diagnosis of Antisocial Personality Disorder should not be made for individuals under the age of 18.¹⁸

Even Dr. Klein's limited report refers to serious disturbances in petitioner's background and makeup. Her repeated statements that petitioner "cannot organize his inner experience," that "[h]e

¹⁷ References preceded by "Tr." are to the trial transcript. References preceded by "R." are to the Record.

¹⁸ See *supra* note 19.

Cf. *Ford v. Wainwright*, 106 S.Ct. 2595, 2605 n.3 (1986) ("The adequacy of the factfinding procedures is further called into question by the cursory nature of the underlying psychiatric examination itself.")

has a stereotypical, concrete view of the world and demonstrates little ability to organize or to conceptualize his experience," that "his inner experience is barren and disorganized," and that his drawings are "primitive and undifferentiated" are suggestive of cognitive limitations and other difficulties in thinking. (R. at 490-91, 489.) In addition, Dr. Klein states both in her report and in testimony that petitioner is educationally well below average. (R. at 489; Tr. at 789.) She concludes that the results of the psychological tests "indicate a person with limited capabilities." (Tr. at 789.) Furthermore, Dr. Klein's report provides a description of petitioner's general immaturity in its references to his restlessness, difficulty in controlling his impulses, and lack of social judgment. (R. at 490-91.) Finally, Dr. Klein's report briefly mentions that petitioner had abused drugs ("sniffed paint") and that he had been beaten by his brother-in-law, Charles Keene. (R. at 488.) There is no evidence in the record that Dr. Klein followed up in these critical areas. The record, however, contains testimony from Vicky Lynn Keene, Charles Keene's ex-wife, describing Charles' extreme brutality toward her, petitioner, and others. (Tr. at 611-16.) Also, Ms. Keene's testimony points out that Charles Keene introduced petitioner to drug abuse. (Tr. at 612.)

Thus, petitioner has been exposed to a constellation of psychological and environmental disturbances which have impeded his natural growth and development. He suffers from serious cognitive and intellectual limitations, educational deficiencies, and immature judgment. Furthermore, petitioner has been a victim of and witness to extreme abuse, which included his brother-in-law's brutality. He is thus typical of the subgroup of adolescents who commit capital offenses.

III

THE EXECUTION OF AN INDIVIDUAL WHO WAS AN ADOLESCENT AT THE TIME OF THE CAPITAL OFFENSE IS EXCESSIVE IN VIOLATION OF THE EIGHTH AMENDMENT

The Eighth Amendment, which applies to the states through the Fourteenth Amendment, forbids the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. A punishment

is "cruel and unusual" if it is excessive. It is excessive if it is disproportionate to the crime or if it makes no measurable contribution to acceptable goals of punishment. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). A punishment is also impermissible if it offends society's "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). *Enmund v. Florida*, 458 U.S. 782 (1982).

Although the Court has determined that the death penalty is not inherently cruel in violation of the Eighth Amendment, *Gregg v. Georgia*, 428 U.S. 153, it has recognized the extraordinary nature of the punishment:

[E]very Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.

Spaziano v. Florida, 468 U.S. 447 (1984) (Stevens, Brennan and Marshall, JJ., concurring in part and dissenting in part) (collecting cases); see also *California v. Ramos*, 463 U.S. 992, 998-99 at n.9 (1983) (collecting cases). Indeed,

[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (footnote omitted).

The question raised herein is whether death is *ever* an appropriate punishment for a youthful offender, an issue that was raised but left unresolved in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The answer to this question must be no. The fundamental differences between adolescence and adulthood, distinctions

universally recognized by the medical and social sciences, as well as the law, make this irrevocable form of punishment both excessive as applied to youths and offensive to contemporary standards of decency.

Execution is disproportionate because adolescents tend to lack that which adults are presumed to possess: the ability to make sound judgments on their own behalf. Moreover, adolescents who commit capital offenses typically suffer from a variety of natural and environmental disabilities which further diminish their culpability for their acts. The penalty of death is too severe a punishment for persons who have not yet lived long enough to learn how to control their impulses, appreciate fully the consequences of their offensive acts, or come to understand how to contend with a hostile environment.

In addition, the death penalty, as applied to adolescents, makes no contribution to acceptable goals of punishment. In *Gregg v. Georgia*, 428 U.S. at 183, this Court recognized that the death penalty serves "two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." Whatever the deterrent effect of capital punishment on adults, the impulsiveness of youth, coupled with an adolescent's general lack of appreciation for the finality of death, seriously undermines whatever deterrent effect the death penalty might have on them. Retribution is objectionable because adolescent offenders are not as responsible as adults for their acts. Retribution is also contrary to the legitimate purposes of punishing the young. Unlike adults, for whom punishment is primarily a punitive sanction, punishment of youthful offenders is intended to be rehabilitative.

In light of all that is known about adolescent development generally and the abnormal development of homicidal adolescents in particular, inflicting the death penalty on young offenders is also offensive to "contemporary standards of decency." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Executing adolescents—who lack the cognitive ability, judgment and fully formed character of adults—fails to accord with "the dignity of man" which is the "basic concept underlying the Eighth Amendment," *Trop v. Dulles*, 356 U.S. at 100.

A. Capital Punishment Is Excessive As Applied to Adolescents Because It Is Disproportionate

A form of punishment is disproportionate, hence excessive under the Eighth Amendment, if it is greater than the offender deserves. *Coker v. Georgia*, 433 U.S. at 592. In determining whether the death penalty is disproportionate as applied to adolescents, this Court must consider whether adolescents should be equated with adults with respect to their eligibility for this ultimate sanction. Because adolescents are not expected to conform their behavior to adult standards, it is inappropriate to inflict on them a form of punishment intended only for society's most serious and incorrigible offenders.³⁹

The fact that a separate system of criminal justice has evolved for adolescents is ample evidence that the death penalty, as applied to adolescents, is disproportionate.

The very existence of a dual criminal justice system is evidence of a two-fold societal judgment that children do not bear the same degree of responsibility for their antisocial behavior as adults and therefore should not be subject to the harsh penalties of criminal trial and penal incarceration; and juvenile delinquents are, by virtue of their youth, responsive to rehabilitative treatment.⁴⁰

Inherent in the law are the basic beliefs that (i) youths should not be punished as severely as adults because they are not as culpable as adults for their offenses; and (ii) youths by nature are receptive to treatment and rehabilitation.

The disparate treatment of youth in the law is amply supported by the clinical evidence about adolescent development. As described in Point I, adolescents are still growing socially and psychologically.

³⁹ Thus, even though adolescents may be legitimately convicted and punished for homicidal acts in appropriate circumstances, their incomplete development should preclude them from eligibility for punishment by death. See *Enmund v. Florida*, 458 U.S. 782 (propriety of death penalty dependent upon degree of culpability of offender).

⁴⁰ S. Fox, *The Juvenile Court: Its Context, Problems and Opportunities* 11-13 (1967).

[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents have less capacity to control their conduct and to think in long-range terms than adults.⁴¹

Thus, execution must be regarded as a disproportionate form of punishment as applied to adolescents. Their diminished responsibility for their acts justifies the added measure of tolerance that exists in the law. Their ability to adjust and improve as they mature further demonstrates the inappropriateness of inflicting on adolescents the ultimate punitive sanction of death.

B. Capital Punishment Is Excessive As Applied to Adolescents Because It Serves No Legitimate Penological Purpose

The death penalty *per se* is not constitutionally excessive because it is thought to make a measurable contribution to two acceptable goals of punishment: deterrence and retribution. *Gregg v. Georgia*, 428 U.S. at 183. Because neither goal can be achieved by inflicting the death penalty on youthful offenders, its application to them is excessive.

1. The Death Penalty Does Not Deter Adolescents From Committing Capital Offenses

In commenting upon the lack of empirical evidence to support or rebut the theory that capital punishment has a deterrent effect, Justice Stewart observed:

We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.

⁴¹ Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 47 (1978). ("Task Force").

Gregg v. Georgia, 428 U.S. at 185-86 (Stewart, J. plurality opinion). In light of what is known today about adolescent development generally and the development of adolescents who commit homicide in particular, adolescents are unlikely to engage in a meaningful "cold calculus that precedes the decision" to commit a capital offense in which "the possible penalty of death" enters into their decision-making process.

As described above, adolescents generally are more impulsive and less able to appreciate the consequences of their acts than adults. Adolescents also tend to lack a fully developed appreciation of death and its finality. Moreover, while adolescents may be capable of rational decision-making in some areas with the guidance and support of adults, this capacity is significantly lessened when they are placed under highly stressful circumstances.⁴²

Such circumstances are abundant with respect to homicidal adolescents. These adolescents typically grow up in a chaotic family environment, are exposed to violence and abuse throughout their childhood, and tend to be impeded in their natural development by the adults upon whom they must rely for protection and support. They also suffer from cognitive limitations which further impair their ability to make sound judgments. These factors are particularly damaging during adolescence because it is at this stage of development that human beings are especially vulnerable and awkward. While adolescents may look like and possess many of the physical attributes of adults, they do not yet think or behave like adults. The violent nature of adolescents

⁴² In sum, although some youths' involvement in delinquency may be related to cost-benefit decisions and to a rational process, other explanations better explain the delinquent behavior of most youths. With the vast majority of youngsters, delinquent behavior arises without much forethought as they interact with their environment. With still other youths, compulsive behavior, the influence of alcohol or drugs, or intense emotional reaction to a situation seem to lead them to bypass any rational process.

C. Bartollas, *Juvenile Delinquency* 102 (1985); see also P. Hahn, *The Juvenile Offender and the Law* 40-57 (2d ed. 1978) (free will and rational choice not among various behavioral theories explaining the causes of delinquency).

who kill is a predictable consequence of the combination of (i) their incomplete human development which has been further hindered by an unstable and violent childhood, and (ii) the rapid physical changes which they are undergoing.

It is thus demonstrably wrong to conclude that the death penalty deters adolescents who commit capital offenses. Adolescents generally do not to engage in any "cold calculus" that would factor in the possibility of a death sentence before they act homicidally. Emotionality, coupled with a pronounced inability to appreciate or be affected by the knowledge of the consequences of their actions, lead adolescents to commit capital offenses. Free will and rational calculation are generally absent in these circumstances.

2. Retribution Is Not a Legitimate Penological Purpose With Respect to Adolescents

The penological goal of retribution has two components: (1) the desire that offenders suffer the punishment they deserve, and (2) the desire for vengeance. See *Gregg v. Georgia*, 428 U.S. at 183-184. Whether these concerns are satisfied is contingent upon the degree of the offender's responsibility for the offense. In *Enmund v. Florida*, 458 U.S. 782, this Court observed:

As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability — what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention — and therefore his moral guilt — to be critical to "the degree of [his] criminal culpability."

Id. at 800 (citations omitted). Thus, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 55 U.S.L.W. 4496, 4499 (U.S. April 21, 1987).

Adolescents, like adults, should pay for their crimes. However, "[t]he juvenile justice system, while holding minors responsible for their misconduct . . . acknowledges that the level of juvenile

responsibility is lower than for adults."⁴³ It is thus excessive to inflict the penalty of death on adolescents.

Neither of the concerns of retribution is satisfied by executing youthful offenders. The punishment of death is too severe because adolescents are not as responsible as adults. In addition, the disparate legal treatment of adolescents is ample evidence that society is less vengeful with respect to youthful offenders.

Retribution is also contrary to the principal legitimate purpose of punishing the young: rehabilitation. Traditional methods of punishing youthful offenders are based upon a presumption that young persons are more amenable to positive change than adults. In fact, this presumption is well-documented. Consequently, the finality and irrevocability of the death penalty makes such punishment manifestly inappropriate for adolescents.

a. Adolescents Are Less Responsible Than Adults For Their Offensive Acts

Adolescents are developmentally different from adults in ways — that diminish their level of responsibility for their actions. Point I documents the inexperience, impulsiveness and emotionality of youth. Adolescents have a greater tendency than adults to act in disregard of the potentially serious and harmful consequences of their acts. Even when they are aware of such consequences, adolescents are more prone than adults to act in spite of them.

[T]he American adolescent, struggling with the biological and psychological pressures of youth, seeks status and reassurance in the company of his peers. Rebellion against parental authority and restrictions is combined with pressure to conform to the expectations of other adolescents. The teen years are a period of experiment, risk taking and bravado. Some criminal activity is part of the patterns of almost all youth subcultures.⁴⁴

⁴³ *Task Force* at 47.

⁴⁴ *Id.* at 3.

This Court has taken note of these developmental distinctions, observing that "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. at 635. *See Gallegos v. Colorado*, 370 U.S. 49, 54 (1962). This fundamental concept of youth forms the basis for state laws which commonly prohibit minors from possessing alcohol in public, from voting, from sitting on a jury, and from marrying without parental consent.⁴⁵

[T]he experience of mankind, as well as the long history of our law, recogniz[es] that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office.

Goss v. Lopez, 419 U.S. 565, 590-91 (1975) (Powell, J., dissenting) (emphasis in original). It also justifies disparate treatment for adolescents under the First,⁴⁶ Fourth,⁴⁷ and Fourteenth⁴⁸ Amendments.

⁴⁵ For example, in Oklahoma, minors — defined as persons under the age of 18 unless otherwise provided by statute, Okla. Stat. Ann. tit. 15, § 13 (West 1983) — are barred from engaging in any of these activities. *See* respectively, Okla. Stat. Ann. tit. 21, § 1215 (West 1983) (21 years of age); U.S. Const. amend. XXVI (18 years of age); Okla. Stat. Ann. tit. 38, § 28 (West Supp. 1987) (18 years of age); Okla. Stat. Ann. tit. 43, § 3 (West 1983) (18 years of age).

⁴⁶ *E.g.*, *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (state law forbidding sale of sexually explicit but non-obscene material to persons under 17 years of age does not violate First Amendment because "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,'" (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944))).

⁴⁷ *E.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (schoolchild's Fourth Amendment right against unreasonable search and seizure and his legitimate expectation of privacy must give way to school's legitimate need to maintain appropriate educational environment).

⁴⁸ *E.g.*, *Schall v. Martin*, 467 U.S. 253 (1984) (state law authorizing preventative detention of accused juvenile delinquents does not violate their Fourteenth Amendment rights if serious risk of subsequent crime exists, because,

(Footnote Continued)

This same concept of youth also warrants less severe punishment. *See supra* at 19-20.

Furthermore, as shown in Point II, adolescents who commit capital offenses are even less responsible for their acts than adolescents generally. Such adolescents tend to lack the support and protection ordinarily provided youths by parents and other family members. In addition, their families are frequently violent and abusive. These factors are further aggravated by psychiatric problems from which homicidal adolescents frequently suffer.

As a result of these factors, the natural maturation process is seriously inhibited. The emotional growth and development of adolescents who are homicidal is, in effect, stunted. The Study appended hereto confirms this general understanding.

The death penalty is thus too severe a punishment for adolescent offenders. Because an adolescent has not yet fully developed emotionally and psychologically, and because an adolescent who commits a capital offense tends to be even more developmentally limited, the execution of such an individual is by definition a greater punishment than he deserves.

b. Vengeance Is Antithetical to the Lawful Treatment of Adolescents

Society's moral obligation to protect its young is indisputable. As Justice Frankfurter observed in *May v. Anderson*, 345 U.S.

although juveniles' liberty interest is strong under Fourteenth Amendment, juveniles, unlike adults, require some form of custody).

Notably, in *Schall* the Court observed:

Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae*" interest in preserving and promoting the welfare of the child."

Id., at 265, quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

528, 536 (1953) (concurring opinion): "Children have a very special place in life which law should reflect. Legal theories . . . lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." Youth and its inherent characteristics — immaturity, vulnerability, inexperience and dependency — place the concept of revenge at odds with the lawful treatment of the young. Thus,

[t]he spectacle of our society seeking legal vengeance through execution of a child raises fundamental questions about the nature of children's moral responsibility for their actions and about society's moral responsibility to protect and nurture children.⁴⁹

As described *supra* at 24, youths are defined as less responsible for their acts by state legislatures and the courts. In addition to a host of both legislatively and judicially imposed restraints on the rights and liberties of adolescents, both state and federal laws provide distinct rules and procedures for the prosecution of youths. Under both state and federal law, many acts which constitute crimes if committed by adults instead constitute acts of "juvenile delinquency" if committed by adolescents. See, e.g., *State In Interest of D.B.S.*, 137 N.J. Super. 371, 349 A.2d 105 (1975).

Society's responsibility to protect and nurture the young is also well supported by legal precedent. This obligation is perhaps best reflected in the Court's long-standing recognition of the guiding role parents play in the upbringing of children.⁵⁰ In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that although a state's interest in compulsory education for its children is indeed

⁴⁹ Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 Okla. L. Rev. 613, 637 (1983).

⁵⁰ Constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, *supra*, at 166.

strong, it must give way to parents' "traditional interest" in raising children. *Id.* at 214. Similarly, when it comes to deciding whether a child is to be committed to a state mental hospital, the Court has stated that it is up to the parents to decide, notwithstanding the child's clear "liberty interest" not to be confined without due process.

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions . . . *Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.*

Parham v. J.R., 442 U.S. 584, 602-603 (1979) (emphasis supplied).

Vengeance cannot therefore serve as a legitimate penological goal with respect to adolescents — even adolescents who commit capital offenses. The diminished culpability of adolescents, coupled with society's obligation to protect the young, warrants a measure of constitutionally imposed tolerance sufficient to bar their execution.

c. Retribution Is Contrary to Rehabilitation, the Principal Legitimate Goal of Punishing Adolescents

Retribution is contrary to rehabilitation, which is the primary goal of punishing the young. E.g., *In the Matter of the Appeal in Maricopa County, Juvenile Action No. J-84536-S*, 126 Ariz. 546, 617 P.2d 54, 56 (1979) ("the most deeply rooted concept in juvenile court philosophy is that the purpose of the system is to rehabilitate and not to punish"); *Rust v. Alaska*, 582 P.2d 134 (Alaska 1978) (express purpose of juvenile jurisdiction is rehabilitation rather than punishment). The reason for this objective is not hard to discern: "[I]ncorrigibility is inconsistent with youth . . . it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life." *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968).

The existence of a juvenile justice system under both state and federal law which treats youthful offenders more leniently than adults demonstrates the importance society places on the goal of rehabilitation with respect to adolescents.⁵¹ For example, the purpose of the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (West 1985), "is to be helpful and rehabilitative rather than punitive . . ." *United States v. Hill*, 538 F.2d 1072, 1074 (4th Cir. 1976). Under the Act, "a juvenile is accorded preferential and protective handling not available to adults accused of committing crimes." *United States v. Frasquillo-Zomosa*, 626 F.2d 99, 101 (9th Cir.), *cert. denied*, 449 U.S. 987 (1980).

Greater tolerance respecting youthful offenders is justified by reason of their heightened capacity for behavior modification. As described *supra* at 7, adolescents are generally more receptive and responsive to rehabilitative treatment. More specifically, "juvenile murderers tend to be model prisoners and exhibit a very low rate of recidivism when released."⁵² Putting adolescents to death is therefore without any legitimate penological justification.

C. The Execution of Adolescents Is Unconstitutional in Light of Contemporary Human Knowledge About Adolescents Generally and Adolescents Who Commit Capital Offenses in Particular

Eighth Amendment analysis is dynamic. Whether the infliction of a particular punishment is inherently cruel is subject to periodic review, which must give due consideration to "contemporary human knowledge." *Robinson v. California*, 370 U.S. 660, 666 (1962). Contemporary human knowledge respecting adolescent development generally and the nature of adolescents who commit capital offenses in particular indicates that the ultimate sanction of death is an inappropriate form of punishment for such persons for the reasons described herein.

⁵¹ See generally A. Platt, *The Child Savers: The Invention of Delinquency* (2d ed. 1977); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1187 (1970); Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104 (1909).

⁵² Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 Cleve. St. L. Rev. 363, 395 (1987) (citing Vitiello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States*, 26 De Paul L. Rev. 23, 32-34 (1976)); D. Hamparian, R. Schuster, S. Dinitz & J. Conrad, *The Violent Few* 52 (1978); T. Sellin, *The Penalty of Death* 102-20 (1982).

The developmental differences between adolescents and adults are alone sufficient to justify a constitutional ban on the execution of youths. It is offensive to "contemporary standards of decency" to commit to death individuals who, because of their lack of maturity, exist in the law as persons who are incapable of making legally binding decisions in certain matters and who are often accorded disparate treatment for acts which would be regarded as criminal if they were adults. The reason for these distinctions is clear: Youths "cannot be judged by the more exacting standards of maturity." *Haley v. Ohio*, 332 U.S. 596, 599 (1948). These same distinctions justify a degree of leniency in the manner in which adolescents who commit capital offenses are punished. The ultimate punitive sanction of death is just too harsh.

However, the analysis need not end there. As shown in Point II, youths who commit capital offenses typically suffer from a variety of serious natural and environmental disabilities. In addition to exhibiting all of the attributes which make youths vulnerable by nature, adolescents who kill are deficient intellectually, emotionally, psychologically and frequently neurologically. Their impairment is aggravated by parents or legal guardians who fail to provide much needed support at a critical stage in their lives, and indeed, who typically provide negative influences. The individuals on death row who were minors when they committed capital offenses exhibit these deficiencies.⁵³ Indeed, petitioner Wayne Thompson is typical of the group.

The execution of persons who commit homicide in their youth is therefore far more offensive as actually applied than it is in the abstract as applied to the universe of adolescents. The commission of a homicide by an adolescent is a reflection of a multitude of serious and complex problems from which the adolescent suffers. Such youths almost invariably have been deprived of a stable,

⁵³ It is thus no response to these considerations that all these factors are considerations that can be introduced as mitigating evidence at the penalty phase of a capital trial under *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny. Clearly *Lockett* was an insufficient check inasmuch as these individuals were sentenced to death despite their substantial impairment.

healthy environment in which to develop. Nor could they rely upon adults to exercise rational judgment on their behalf. Most significantly, however, the law has provided them little practical recourse. Adolescents who commit homicide are legally subject to the will of and reliant upon adults who typically contribute substantially to the adolescents' impairment.

The most fundamental concepts of fairness are thus implicated by the execution of persons who have committed homicide in their adolescence. They lack not only the maturity necessary to be accorded the full panoply of civil rights and liberties afforded adults, but also the protective support and guidance from responsible adults who are legally authorized to impose their will upon them. The death penalty should not therefore be inflicted on adolescents because it is both offensive and excessive as applied to them.

CONCLUSION

The execution of adolescents is inherently cruel and unusual in violation of the Eighth Amendment, and consequently, petitioner's death sentence should be vacated.

Respectfully submitted,

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APPENDIX

APPENDIX

NEUROPSYCHIATRIC, PSYCHOEDUCATIONAL AND FAMILY CHARACTERISTICS OF 14 JUVENILES CONDEMNED TO DEATH IN THE UNITED STATES

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The purpose of this paper is twofold: 1) to describe the biopsychosocial characteristics of 14 juveniles sentenced to death in the United States, and 2) to explore the implications of these findings for imposition of the death penalty on juveniles.

THE LITERATURE

The execution of juveniles in America dates back to the 17th century when, in 1642, a child was executed for the crime of bestiality (1). Since then, there have been a total of 272 juveniles executed in the United States (2). These include 3 executions in 1985-1986 of boys condemned as juveniles but executed after they reached majority. Thus, the recent tendency has been to execute young adults for crimes committed as juveniles, thereby avoiding the actual execution of children. During the time of the evaluations conducted for this study, the number of juveniles awaiting death rose from 33 to 37.

United States law permitting the execution of juveniles is based on English common law. Although the death penalty for juveniles was abolished in England in 1908, histories of English law recount numerous cases from 1708 onward of children condemned to death (3, 4, 5). According to a 19th century account of the history of the town of Lynn, "In 1708 . . . two children were hanged here for felony, one eleven, and the other but seven years of age; which, if true, must indicate very early and shocking depravity in the sufferers, as well as unusual and excessive rigour on the parts of the majestates in the infliction of capital punishment." (6) There is evidence to suggest, however, that although many children were sentenced to death in England in the 19th century, most of these sentences were commuted (7). Nevertheless, children did hang, and for crimes far less serious than murder. Blackstone, in his Commentaries on the Laws of England (8), commented on the treatment of juveniles: "If it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death." Blackstone went on to cite cases of boys 9 and 10 years old who had killed companions and were hanged because their behaviors indicated a sense of guilt. In the first instance, the child hid himself after the murder; in the second instance, the child hid

the body of the victim. Thus, both children were considered to have been aware of the wrongfulness of their acts and therefore candidates for execution.

United States law regarding the responsibility of children has rested heavily on the commentaries of English jurists such as Blackstone. However, modifications based on case law have occurred. For example, in the case of *State v. Doherty* (9), where a child of approximately 13 years of age had killed her father, the judge instructed the jury to assume that a child under 14 years could not "discern between right and wrong unless it were proven otherwise." Similarly, in the case of *State v. Aaron* (10), in which an 11 year old slave was accused of murdering a younger child, the 11 year old's conviction and sentence of death were overturned by the Supreme Court of New Jersey. This decision was based on the grounds that the conviction was obtained by means of a pressured confession, and that the presumption of innocence had not been refuted by "strong and irresistible evidence that he had sufficient discernment to distinguish good from evil".

On the other hand, the outcome was quite different in the case of *Godfrey v. State* (11), in which a slave of approximately 11 years hacked a 4 year old to death, then, covered with blood, blamed the act on imaginary Indians. The child was sentenced to death. In spite of clear evidence of infantile reasoning he was executed. A review of the 14 leading cases of criminal responsibility of children in the United States in the 19th century revealed that only 2 children, both slaves, were actually executed. (6) As for the recent past, to quote Streib, "79% (33/42) of the children executed since 1945 were black." (7)

Clearly, there is a tradition in this country of holding juveniles responsible for their acts and meting out punishments as though the children were adults. Above the age of 7 years, children have been assumed to be able to discern between good and evil, the basic legal criterion for adjudicating culpability. Modern concepts regarding the juvenile's cognitive development, his capacity to make mature judgments and his ability to maintain adequate impulse controls have not been major considerations in the

establishment of United States law regarding the execution of juveniles.

In fact, to date, little or nothing is known about the mental condition and cognitive capacities of juveniles sentenced to death, except what can be gleaned from popular accounts in newspapers and trial transcripts. Thus, we do know only from newspaper accounts that of the 3 juveniles executed in the 1980's one was retarded and another had spent time in a mental hospital (13, 14). Given the dearth of information regarding the biopsychosocial status of juveniles condemned to death, we welcomed the opportunity to conduct comprehensive psychiatric, neurological, neuropsychological, and educational assessments of approximately 40% of the juveniles currently awaiting execution in the United States.

METHOD

SUBJECTS

Our subjects were 14 boys, each of whom had been sentenced to death for capital offenses committed before reaching his 18th birthday. These 14 comprised all the juveniles sentenced to death in each of 4 different states in which the execution of minors is permissible by statute. Subjects were chosen because of their youth and not because of any known psychopathology, and can be presumed to be representative of the juvenile death row population. Ages at the time of their offenses ranged from 15 years 10 months to 17 years 10 months (mean 16 years 6 months). Their ages at the time of evaluation ranged from 17 years 10 months to 29 years 2 months (mean 22 years 3 months). There were 6 Black subjects, 7 White subjects and 1 Hispanic subject.

DIAGNOSTIC EVALUATION

The diagnostic evaluation consisted of psychiatric, neurological, psychological, neuropsychological, educational and electroencephalographic examinations.

The psychiatric examination consisted of a semistructured interview based on an expanded version of the Bellevue Adolescent Interview Schedule (B.A.I.S.). This schedule, consisting of

160 questions, was devised because no existing diagnostic instrument for children or adults dealt adequately with topics such as medical history, history of neuropsychiatric symptoms (*e.g.*, lapses, headaches, memory impairment, metamorphopsias, *deja vu*), characteristics of temper, or history of physical abuse. A pretesting of this instrument prior to its use in this study revealed that data obtained was appreciably more comprehensive than that obtained after a routine 2 week evaluation on an adolescent inpatient teaching service. In this study, the psychiatric evaluation was conducted by a psychiatrist and required from 4 to 6 hours to administer.

Although a detailed description of B.A.I.S. is beyond the scope of this report, suffice it to note that in addition to exploring psychodynamic factors and performing careful mental status evaluations, the psychiatrist obtained detailed medical, family and social histories. Detailed neurological histories were obtained by the psychiatrist and the neurologist including histories of perinatal difficulties, head injury, illnesses or drug overdoses known to affect the CNS, loss of consciousness, fainting, blackouts or other lapses, seizures, and psychomotor epileptic symptoms. Whenever histories of CNS insults were obtained, attempts were made to corroborate them through physical examination (*e.g.*, scars, neurological signs), record reviews, and specialized tests (*e.g.*, EEG).

Standard neurological examinations were performed on 12 of the 14 subjects (in 2 cases, scheduling precluded a neurological examination). The neurological examination consisted of measurement of head circumference; evaluation of cranial nerves; and tests of motor, sensory and reflex functions. Tests of coordination included quantification of numbers of alternating palm strikes in 10 seconds and numbers of finger taps in 10 seconds. Presence or absence of choreiform movements were determined by having the subject extend his arms and fingers in front of him and above his head for 5 seconds. All subjects were asked to skip after the examiner demonstrated the required pattern of movement. The neurologist also performed a mental status examination which included tests of orientation, and memory for digits

forward and backward. Calculation skills were assessed by four serial subtractions of 7's starting from 100. Because of its importance in previous studies (15), and because of the subjectivity of the assessment of this particular symptom, both clinicians assessed the presence or absence of paranoid ideation. In only 1 case did their rating differ, and, in that case, the subject was coded as not having paranoid symptoms.

Certain other issues were covered by both the psychiatrist and the neurologist independently. For instance, both tried to ascertain whether a child had been the victim of abuse or had been witness to extreme family violence. A subject was considered to have been physically abused if he had been punched, beaten with a stick, board, pipe, or belt buckle; or had been beaten with a belt or a switch other than on the buttocks. A subject was also considered to have been physically abused if he had been deliberately cut, burned, or thrown down stairs or across a room. A subject was not considered to have been physically abused if he had been struck only with an open hand or beaten with the leather part of a belt or with a switch only on the buttocks.

A subject was considered to have been sexually abused if, as a child, older persons had fondled his genitals or penetrated his anus. Sexual abuse was also considered to have occurred if the child had been forced to perform sexual acts on an older person of either sex.

In addition to the neurological examination, all subjects had a neurometric quantitative electroencephalogram (QEEG) performed. Unfortunately, in 4 cases interference from metal structures and electronic equipment within the prisons distorted the data. However, QEEG data on 10 of the 14 subjects was obtained. For purposes of this phase of the study, 2 minutes of artifact free QEEG data were analyzed visually in order to determine the existence of sharp waves and/or actual seizure activity. More detailed analysis of the data will be reported subsequently.

Psychological testing consisted of the administration of the Weschler Adult Intelligence Scale-Revised (16), the Bender-Gestalt Test (17), and Rorschach Test (18), the Draw-A-Person Test (19), and the Halstead-Reitan Battery of Neuropsychological Tests (20).

Educational testing consisted of the administration of the Woodcock-Johnson Psycho-Educational Battery (21) and the "Mini-Screen" subtest from the Test of Adolescent Language (22), the "Story" subtest from the Test of Written Language (23), and a speech screening test.

FINDINGS

To provide the reader with a sense of the types of crimes committed by these subjects, Table 1 presents a list of offenses for which each subject was convicted.

Table 2 presents evidence of central nervous system trauma. All of the 14 subjects suffered head injuries during childhood, 9 of which were severe enough to result in hospitalization, indentation of the cranium and/or loss of consciousness. For example, one subject was hit by a truck at age 14 years that fractured his skull, and he was hospitalized for 11 months. Another fell off the roof of a house and lost consciousness at age 10, had a serious motorcycle accident at age 15, and had palpable scars bilaterally in the occipital region.

Still another subject was hit by a car at age 6 and hospitalized for approximately 6 months, and subsequently fell from a roof onto his chin in later childhood. These head injuries were confirmed by scars in the occipital region and on the chin. Thus, significant injury to the central nervous system was prevalent in this group of condemned juveniles.

Table 3 illustrates the neurological and electroencephalographic findings. In 9 cases serious neurological abnormalities were documented including evidence of focal brain injury (subjects 1, 13), major neurological abnormalities such as abnormal head circumference or a positive Babinski sign (subjects 5, 10, 12), a history of grand mal seizures (subject 6), and symptoms or electroencephalographic findings strongly suggestive of a previously undiagnosed seizure disorder (subjects 2, 7, 8).

Table 4 illustrates the severe psychopathology characteristic of the 14 juveniles. As can be seen, 7 of the subjects were psychotic

at the time of their evaluations and/or had been so diagnosed in earlier childhood (subjects 1, 2, 3, 6, 9, 12, 14). An additional 4 subjects had histories consistent with diagnoses of severe mood disorders (subjects 5, 7, 10, 11). The 3 remaining subjects experienced periodic paranoid ideation at which times they often assaulted their perceived enemies. It is noteworthy that 7 of the subjects suffered from psychiatric disturbances that were first manifested in early or middle childhood. For example, one was so behaviorally disturbed he required special classes since 1st grade; another had multiple psychiatric evaluations and was treated with a variety of medications since age 6; and another attempted suicide at 11 years of age.

Table 5 presents data from selected subtests of the psychoeducational test batteries. This table illustrates that only 2 subjects had I.Q. scores above 90. One subject scored in the 60's, 5 in the 70's, and the remaining 6 in the 80's. Of particular importance was the finding that 9 subjects made more than 50 errors on the categories subtest of the Halstead-Reitan Battery of Neuropsychological Tests, which is a test of the ability to formulate abstract concepts. A score of more than 50 errors is considered to be indicative of brain dysfunction. Within this group of 9, 7 subjects also scored within the impaired range on the tactile performance test, another indicator of significant brain dysfunction.

Examination of the reading comprehension subtest scores of the Woodcock-Johnson Psycho-Educational Battery indicates that only 3 juveniles were reading at grade level and 9 were reading 4 or more years below their expected grade for their age. In fact, 3 subjects did not learn to read until their incarceration on Death Row. Another indication of deficits in abstract reasoning was their scores on the concept formation subtest of the Woodcock-Johnson. Indeed, 7 of the 14 scored below the fifth grade level on this test, and of these, 4 were functioning at a first or second grade level. Thus, several measures indicated that the majority of subjects in this sample had severe deficiencies in abstract reasoning and were functioning far below the expected levels for their ages.

As shown in Table 6, 12 of the subjects had been brutally physically abused, often by more than one family member. In addition, 5 more of the subjects had been sodomized by older male relatives, 3 for extended periods of time during childhood. In fact, 4 of these children had been sodomized by more than 1 individual. Therefore, not only did older family members, parents in particular, fail to protect these adolescents, but they also often used the subjects to vent their rages and to satisfy their sexual appetites. Alcoholism, drug abuse, psychiatric treatment, and psychiatric hospitalization were prevalent in the histories of the parents of these subjects.

Of note, in only 5 cases were pretrial psychiatric or psychological examinations of any kind performed. These tended to be brief and perfunctory and only once reported the existence of significant neuropsychiatric impairment. In that case the boy was diagnosed by one psychiatrist as schizophrenic and by another as suffering from an organic psychosis.

DISCUSSION

Our data indicate that juveniles condemned to death in the United States are multiply handicapped. They tend to have suffered serious injuries to the central nervous system, to have suffered since early childhood from a multiplicity of psychotic symptoms, and to have been physically and sexually abused. In 6 cases alcohol or drugs definitely contributed to uncontrolled behaviors and in 2 other cases alcohol and drugs were probable contributors.

In what ways do these factors contribute to their violent behavior? First, the kind of diffuse central nervous system injury that they sustain contributes to their emotional lability, impulsivity, and difficulty in controlling aggressive behaviors. Such brain injured youngsters are also especially vulnerable to the disorganizing effects of alcohol and drugs.

The most prevalent psychotic symptom experienced by these youngsters is episodic paranoid ideation. This symptom is probably a result of the combination of brain injury, violent parental behavior, and at times, the genetic vulnerability inherent in being the child of one or two psychotic parents. Whatever the

causes, these youngsters, as a result of paranoid misperceptions and a pervasive sense of being endangered, lash out readily at real and imagined threats. In this way, offenses that start out as simple robberies or burglaries escalate into homicidal acts.

The severe cognitive impairment characteristic of these juveniles further compromises their ability to make mature judgments and act in accordance with them. These juveniles are, rather, bound by immediate stimuli and tend to act before they think. They are also easily influenced by those around them and sometimes take literally statements that are intended simply as expressions of exasperation (e.g., "Somebody ought to kill that guy"). It is not unusual for such children to act out the conscious or unconscious homicidal wishes of parental figures, older siblings, or older peers (24).

Physical and sexual abuse contribute to these juveniles' violence in several ways. First, the abuse itself is frequently characterized by multiple batterings to the child's head. These children are thrown to the floor, slammed against walls, thrown down stairs, and even kicked in the head. Thus, the impulsivity secondary to brain injury may often be the direct result of these batterings. Second, parental violence functions as a model for behavior. Whether one describes this phenomenon as "identification with the aggressor" or as modeling is irrelevant. Children imitate what they see. Finally, the kind of irrational brutality to which they have been exposed and subjected engenders rage, rage that is rarely expressed toward the child's battering parents or caretakers. More often, it is displaced onto other individuals in the child's environment.

It is likely that some of the very vulnerabilities that contributed to the condemned juveniles' violence also contributed indirectly to the harshness of the sentences they received. Theoretically, all of the vulnerabilities described, neurological impairment, psychiatric illness, cognitive deficits, and parental abusiveness are mitigating factors that, coupled with the juveniles' age, would argue against the imposition of the death sentence. Unfortunately, such cognitively handicapped juveniles have no idea of the existence of these vulnerabilities, much less of their relevance to

issues of mitigation. In fact, they almost uniformly try to hide evidence of cognitive deficits and psychotic symptomatology. They would prefer to be considered bad to being considered sick or retarded. They frequently tell examiners "I'm not crazy" or "I'm not a retard."

Similarly, these juveniles are ashamed of their parents' brutality toward them and try to conceal it or minimize it. Only painstaking, lengthy interviews, inquiring in detail about injuries, inquiring about the origin of visible scars, and asking about "scars I can't see" are likely to reveal the extent to which these juveniles themselves have been victimized. Even the most harsh abuse is often interpreted by the juvenile as punishment that was deserved and therefore to be hidden. Suffice it to say that a history of sexual abuse is even more likely to be concealed. Thus, these juveniles systematically conceal those factors in their lives most likely to mitigate against a sentence of death. It is, therefore, up to the adults in their families to make sure that factors relevant to the juveniles' defense are introduced at sentencing. Unfortunately, in the case of homicidal children, the very adults who should be assisting in their children's defense are not only inadequate to this task by virtue of their own psychopathology, but also have a vested interest in concealing the parental misconduct that would constitute mitigating circumstances. In fact, we have found that in several capital cases family members have cooperated with the prosecution, have testified against their own children, or have urged the judge to impose a death sentence.

Conceivably, the juveniles' lawyers might be relied upon to unearth and make use of the kinds of clinical data described in this paper. Such was not the case. The time and expertise required to document this quality of clinical information was not available.

Indeed, of these 14 subjects only 5 received pretrial evaluations of any kind. These 5 evaluations tended to be perfunctory and gave inaccurate and inadequate portrayals of the adolescents' neuropsychiatric and cognitive status.

Furthermore, the attorneys' alliances were often divided between the juveniles and their families. In fact, on several occasions,

our clinical team was requested by attorneys to conceal or minimize information regarding parental physical and sexual abuse in order to spare the family any embarrassment. Thus, some of the very factors that led to the juveniles' aggression in the first place also contributed to an inadequate defense during the sentencing portion of their trials.

In short, factors such as brain damage, paranoid ideation, physical abuse and sexual abuse, all of which would have been relevant to issues of mitigation, were overlooked or deliberately concealed in the cases of these 14 condemned juveniles.

Adolescence is well recognized to be a time of great physiological and psychological stresses. Normal adolescents are distinguished from adults by their intensity and volatility of feelings, their poor tolerance of anxiety, their lack of awareness of the effects of their actions, their failure of self-criticism, and their difficulty appreciating the feelings of others (25). Our data indicate that, above and beyond these maturational stresses, homicidal adolescents must cope with brain dysfunctions, cognitive limitations, and severe psychopathology. Moreover, they must function in families that are not merely nonsupportive but also violent and brutally abusive. These findings raise questions about the American tradition of considering adolescents to be as responsible as adults for their offenses and of sentencing them to death.

TABLES

Table 1. Offenses of 14 Juveniles Condemned to Death

Subject Offense

- ** 1 Raped and murdered young woman.
- * 2 Shot and killed subject's attorney's sister, then attempted to rape her.
- 3 In the company of a 14-year old accomplice, shot and killed man in the course of a burglary.
- 4 In the course of a robbery of a convenience store, shot and killed female clerk.
- 5 During a robbery with one other person, shot and killed convenience store clerk.
- 6 Raped, stabbed, and strangled a 76-year old nun.
- ** 7 During a spree of six robberies in one week, shot and killed male grocery store customer.
- * 8 In the company of others, bludgeoned male victim with tire jack while stealing car.
- * 9 Shot female convenience store clerk in the course of a robbery. The woman died five weeks later.
- 10 Abducted, raped, then shot and killed female convenience store clerk.
- * 11 Stabbed female victim 60 times, bit her breast, and pushed his hand into her vagina.
- 12 Participated with a gang in the robbery and murder of a business man.
- * 13 In the company of others, shot and killed relative.
- * 14 Shot and killed mother and stepfather.

* Subject was under the influence of alcohol or drugs at the time of the offense.

** Subject may have been under the influence of alcohol or drugs at the time of the offense.

Table 2. Head Injuries of 14 Juveniles Condemned to Death

	<i>Nature of Trauma</i>	<i>Objective Indicators</i>
Subject 1	Automobile accident at age 12 (L.O.C.)* Repeated blows to the head from father in infancy	Deep indentation of cranium behind right ear.
Subject 2	Hit by truck at age 4, fractured skull, comatose for days.	Hospitalized 11 months.
Subject 3	Fall from tree at age 11 (L.O.C.): Severe blow to head at age 13.	Multiple scars on head.
Subject 4	Shot in right temple at age 16. Mother broke plate over subject's head during childhood.	Indentation in right temporal area. Many scars on face.
Subject 5	Blow to head at age 8 with amnesia lasting approximately 2 weeks.	No documentation.
Subject 6	Fall from roof at age 10 (L.O.C.): Motorcycle accident at age 15 (ran into car).	Scar in right occipital region. Scar in left occipital region.

Table 2. Head Injuries of 14 Juveniles Condemned to Death (Continued)

	<i>Nature of Traumata</i>	<i>Objective Indicators</i>
Subject 7	Car accident at age 10 (L.O.C.)* Hit in head with board during early childhood (tried to intervene when parents were fighting).	Indentation of forehead.
Subject 8	Fall from bunk bed at age 7. Serious bicycle accident in later childhood.	Indentation of cranium in center of forehead. Multiple facial scars.
Subject 9	Motorcycle accident in adolescence; uncertain severity. Multiple L.O.C.* secondary to blows to head.	No documentation (Scar on right cheek — questionable etiology).
Subject 10	Fall from bed onto face as infant. Car accident with head injury. Fell down flight of stairs early childhood.	Deviated septum from first accident. Scars on chin and upper lip.
Subject 11	Car accident in early childhood (possible L.O.C.)*; Motorcycle accident at age 17 years (hit branch, fell off backwards).	No documentation

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Table 2. Head Injuries of 14 Juveniles Condemned to Death (Continued)

	<i>Nature of Traumata</i>	<i>Objective Indicators</i>
Subject 12	Hit by car at age 6 (L.O.C.)* Fall from roof onto chin in later childhood.	Hospitalized 6 months for first accident. Scar in occipital area. Numerous facial scars.
Subject 13	Fall from tree at age 7 (possibly hit head). Bicycle ran into car at age 13; knocked dizzy. Kicked in head by brother-in-law middle childhood.	Prominent bump right forehead. Scar left of left ear.
Subject 14	Bicycle accident at age 10; fell in ditch. Severe bicycle accident at approximately age 12 (L.O.C.)* Broke nose and was told he "cracked skull".	Surgery required to repair nose. Multiple facial scars.

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* L.O.C. = Loss of consciousness.

Table 3. Neurological Signs and Symptoms of 14 Juveniles Condemned to Death

<i>Subject</i>	<i>Subject Symptoms of Neurological Dysfunction</i>	<i>Objective Evidence of Neurological Dysfunction</i>
1	Lapses of fully conscious awareness. Frequent severe headaches.	Evidence of diffuse cerebral dysfunction (e.g., multiple "soft signs") and suggestion of focal damage (e.g., extinguishes left visual field). EEG-increased slow waves right temporal & bilateral parieto-occipital regions, possible sharp waves.
2	Dizzy episodes with falling and confusion. Multiple psychomotor symptoms (e.g., macropsia, peculiar tastes, multiple <i>deja vu</i>).	Neurologist suspects seizures. EEG did not function.
3	Bizarre, sometimes violent behaviors for which memory is impaired. Visual distortions. Multiple <i>deja vu</i> .	Neurological exam was not performed. EEG — sharp waves especially in the left temporal region.

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Table 3. Neurological Signs and Symptoms of 14 Juveniles Condemned to Death (Continued)

<i>Subject</i>	<i>Subject Symptoms of Neurological Dysfunction</i>	<i>Objective Evidence of Neurological Dysfunction</i>
4	Lapses of full conscious awareness. Episodes of unresponsiveness with inability to comprehend. Migraine-type headaches.	Normal neurological exam. EEG — abnormal diffuse, excessive alpha activity; bilateral temporal sharp waves.
5	Severe headaches.	Right positive Babinski sign. EEG did not function.
6	History of grand mal seizures with urinary incontinence. Olfactory hallucinations. Impaired memory for behaviors.	Mild, left sided weakness. Bilateral unsustained clonus. EEG did not function.
7	Multiple psychomotor symptoms (e.g., micropsia, <i>deja vu</i> , olfactory hallucinations).	Hyperactive deep tendon reflexes. EEG — severe abnormalities in left temporal and right frontal regions.
8	Occasional dizziness. Occasional lapses of fully conscious awareness.	Neurological exam not performed. EEG — abnormal sharp waves throughout record, especially left temporal area; suggests epileptiform disorder.

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Table 3. Neurological Signs and Symptoms of 14 Juveniles Condemned to Death (Continued)

<i>Subject</i>	<i>Subject Symptoms of Neurological Dysfunction</i>	<i>Objective Evidence of Neurological Dysfunction</i>
9	Dizzy episodes.	Saccadic eye movements, "Little other evidence of neurological dysfunction." EEG - possible sharp waves.
10	Hypergraphia Micropsia. Possible episodic lapses.	Unsustained ankle clonus bilaterally; multiple "soft" signs; suggestion of seizures. EEG - slightly abnormal; equivocal sharp waves in temporal and central regions.
11	Lapses of fully conscious awareness. Dizzy spells. Brief lapses of awareness, multiple psychomotor symptoms, e.g., olfactory hallucinations, micropsia, memory impairment.	Multiple "soft signs". EEG - equivocal sharp waves in right parietal and posterior temporal regions.
12	Severe headaches. Impaired memory for behaviors.	Macrocephaly. EEG did not function.

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Table 3. Neurological Signs and Symptoms of 14 Juveniles Condemned to Death (Continued)

<i>Subject</i>	<i>Subject Symptoms of Neurological Dysfunction</i>	<i>Objective Evidence of Neurological Dysfunction</i>
13	Lapses of awareness. Impaired memory for behaviors. Frequent deja vu.	Left ankle clonus; poor rapid alternating movements on left; "evidence of right hemisphere dysfunction." EEG - diffusely abnormal.
14	Lapses of fully conscious awareness. Multiple psychomotor symptoms (e.g., metamorphopsias, frequent deja vu, dreamlike states, impaired memory for behaviors).	Normal neurological exam. EEG - possible sharp activity.

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Table 4. Psychiatric Characteristics of 14 Juveniles Condemned to Death

<i>Subject</i>	<i>Recent Psychiatric Signs and Symptoms</i>	<i>Childhood Indicators of Psychopathology</i>
1	Paranoid ideation. Occasional command hallucinations. Rambling, illogical.	Severe emotional and behavioral problems since kindergarten. Required special classes since 1st grade.
2	Periods of grandiosity, racing thoughts, insomnia. Episodically paranoid. Past suicide attempts.	Psychiatrically hospitalized and diagnosed "organic psychosis" at age 15 years.
3	Auditory hallucinations. Paranoid episodes that provoke retaliation.	
4	Considered excessively guarded, possibly paranoid, by 2 independent examiners.	

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Table 4. Psychiatric Characteristics of 14 Juveniles Condemned to Death (Continued)

<i>Subject</i>	<i>Recent Psychiatric Signs and Symptoms</i>	<i>Childhood Indicators of Psychopathology</i>
5	Severely depressed and suicidal at time of interview (Beck's Depression score = 28). Episodes of racing thoughts and insomnia for 2-3 days.	Recurrent depressions since childhood. Suicide attempt at age 11 years.
6	Auditory and visual hallucinations during interview. Paranoid ideation. Diagnosed schizophrenic in prison.	Visual and auditory hallucinations beginning at approximately age 9.
7	Auditory hallucinations of an insulting nature. Manic episodes and 6-7 depressive episodes.	Psychiatric symptoms of questionable nature requiring psychiatric evaluation at age 8 years.
8	Paranoid ideation resulting in retaliation for imagined insults. Paranoia exacerbated by alcohol.	

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Table 4. Psychiatric Characteristics of 14 Juveniles Condemned to Death (Continued)

<i>Subject</i>	<i>Recent Psychiatric Signs and Symptoms</i>	<i>Childhood Indicators of Psychopathology</i>
9	Pervasive paranoid ideation. Possible auditory hallucinations. At times, incoherent during interview. Inappropriate affect.	Psychiatric treatment at age 12 for exposing himself and compulsion to touch women's breasts.
10	Suggestion of bipolar mood disorder with insomnia, racing thoughts, hypergraphia, hyperactivity.	
11	Frequent paranoid misperceptions resulting in fights. One episode of auditory hallucinations. Depressive and euphoric periods.	Depressive symptomatology since early childhood.
12	Rambling, illogical, delusional, paranoid, inappropriate smiling (paranoid schizophrenic).	Severe emotional problems and multiple psychiatric evaluations and treatments since 6 years of age.

Table 4. Psychiatric Characteristics of 14 Juveniles Condemned to Death (Continued)

<i>Subject</i>	<i>Recent Psychiatric Signs and Symptoms</i>	<i>Childhood Indicators of Psychopathology</i>
13	Suggestion of paranoid ideation (e.g., must keep back to the wall even before entering prison).	Drug abuse since 8 years of age. Alcohol abuse since 10 years of age.
14	Floridly psychotic. Visual and auditory hallucinations. Bizarre behaviors (e.g., drinking blood daily, sticking tacks in head). Suicidal ideation.	Auditory hallucinations starting at 6 years of age.

Table 5. Neuropsychiatric and Psychoeducational Scores of 14 Juveniles Condemned to Death

Subject	WAIS-R I.Q.				Halstead-Reitan		Woodcock-Johnson		
	Verbal	Performance	Full Scale	Categories (errors)	Tactile Performance (minutes)	Impairment Index	Reading Comprehension (grade equiv.)	Calculation (grade equiv.)	Concept Formation
1	67	63	64	113*	37.0**	1.0***	2.3	3.0	1.0+
2	85	84	85	57*	9.4	0.4	7.6	3.3	5.8+
3	76	82	77	57*	10.8	0.7***	6.6	7.5	1.0+
4	75	76	74	96*	23.3**	0.7***	5.8	7.5	2.2+
5	88	88	86	90*	9.5	0.6	12.9	5.0	12.8
6	80	87	82	93*	27.3**	0.9***	10.6	6.6	8.6
7	84	71	77	93*	25.0**	0.7***	5.6	5.0	4.6+
8	75	85	77	66*	18.6**	0.7***	8.6	5.3	3.0+
9	84	85	83	38	21.6**	0.7***	8.6	8.0	5.8+
10	112	90	106	15	8.4	0.1	12.9	12.9	7.1+
11	68	91	81	23	12.7	0.4	1.1	6.6	3.6+
12	71	77	73	91*	15.6**	0.5	2.0	2.6	1.0+
13	86	94	88	11	6.4	0	9.5	6.2	10.8
14	115	125	121	19	8.9	0	12.9	12.9	19.9

* Greater than 50 errors on the categories test is indicative of significant brain dysfunction.

** Greater than 15 minutes on the Tactile Performance test is indicative of significant brain dysfunction.

*** An overall impairment index of 0.7 or greater is indicative of brain damage.

+ Subject functions significantly below his appropriate grade level in concept formation.

Table 6. Evidence of Physical and Sexual Abuse, Family Violence, and Family Psychiatric Illness of 14 Juveniles Condemned to Death

	Physical Abuse	Sexual Abuse	Family Violence & Psychiatric Illness
1	Beaten by father, mother, stepfather, with switches, cords, belts, etc. causing cuts and bleeding. Blows to head.	Stepfather may have sexually abused sister.	Father and stepfather beat mother. Father alcoholic. Mother alcoholic and drug abuser.
2	Beaten with belt buckle and hit in head with hammer by stepfather. Made to kneel on rice.	Sodomized by step-father and grand-father throughout childhood and adolescence.	Stepfather assaulted mother. Mother psychiatrically hospitalized and alcoholic.
3	Placed in children's shelter in early childhood.		Mother threw objects at father. Mother takes medicine for her nerves.
4	Whipped all over body with belts and switches by stepfather. Mother broke plate over subject's head.		Violence between mother and stepfather.

Table 6. Evidence of Physical and Sexual Abuse, Family Violence, and Family Psychiatric Illness of 14 Juveniles Condemned to Death (Continued)

	<i>Physical Abuse</i>	<i>Sexual Abuse</i>	<i>Family Violence & Psychiatric Illness</i>
5	Punched around by father. Beaten on legs and buttocks by mother.		Father injured mother and was also violent with others. Several schizophrenic paternal relatives.
6	Stepfather sat subject on lighted burner of stove. Father punched subject with fists.	Sodomized by stepfather and his friends. Possible sexual abuse by mother and brother.	Father beat mother during pregnancy with subject and afterward. Mother had several "nervous breakdowns."
7	Father hit subject in head with board, punched him in face and broke front teeth, and beat subject all over body.		Parents fought violently with each other (one time hit subject in head by accident). Mother had multiple psychiatric hospitalizations and seizures.

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Table 6. Evidence of Physical and Sexual Abuse, Family Violence, and Family Psychiatric Illness of 14 Juveniles Condemned to Death (Continued)

	<i>Physical Abuse</i>	<i>Sexual Abuse</i>	<i>Family Violence & Psychiatric Illness</i>
8	Beaten by father with extension cords, bullwhips, and 2x4 boards.		Hitting fights between parents. Father possibly alcoholic.
9	Beaten by stepfather all over body with extension cords and belts.		Siblings beat up stepfather for his treatment of subject.
10	None	None	None
11	Beaten by mother, father, grandmother.	Sodomized by uncle and male cousin from ages 5-11 years. Sexually abused by older female cousin at age 4 years.	Parents assaulted each other. Father alcoholic with Delerium Tremens and psychotic. Mother and father take pills for nerves.

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Table 6. Evidence of Physical and Sexual Abuse, Family Violence, and Family Psychiatric Illness of 14 Juveniles Condemned to Death (Continued)

	Physical Abuse	Sexual Abuse	Family Violence & Psychiatric Illness
12	Beaten with extension cords by father and mother, sometimes beaten in the face.		Father and mother alcoholic. Mother suffers from depression.
13	Beaten and stomped by older brother. Whipped with sticks by mother. Kicked in head by brother-in-law.	Sodomized by older cousin once in early childhood. Attempted sexual assault by brother-in-law.	Extreme violence using weapons by several family members.
14	Beaten in infancy by father. Beaten by mother with ropes, shoes, belts, etc. Beaten with switches by grandfather.	Sodomized by family member when age 8. Sodomized by family friend in early childhood. Possible sexual abuse by female daycare worker.	Extreme violence; Stepfather preferred "hunting men" to animals; Stepfather cut another man; Brutality to animals. Father drug abuser. Mother takes medication for nerves.

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JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,

Petitioner,

—v.—

STATE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

**BRIEF OF THE CHILD WELFARE LEAGUE OF
AMERICA, NATIONAL COUNCIL ON CRIME AND
DELINQUENCY, CHILDREN'S DEFENSE FUND,
NATIONAL ASSOCIATION OF SOCIAL WORKERS,
NATIONAL BLACK CHILD DEVELOPMENT
INSTITUTE, NATIONAL NETWORK OF RUNAWAY
AND YOUTH SERVICES, NATIONAL YOUTH
ADVOCATE PROGRAM, AND AMERICAN YOUTH
WORK CENTER AS *AMICI CURIAE* IN SUPPORT
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

WILLIAM WAYNE THOMPSON,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

On Writ of Certiorari to the Court of
Criminal Appeals of the State of Oklahoma

BRIEF OF THE CHILD WELFARE LEAGUE OF AMERICA, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, CHILDREN'S DEFENSE FUND, NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL BLACK CHILD DEVELOPMENT INSTITUTE, NATIONAL NETWORK OF RUNAWAY AND YOUTH SERVICES, NATIONAL YOUTH ADVOCATE PROGRAM, AND AMERICAN YOUTH WORK CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE¹

The Amici who have joined in submitting this brief are linked by their special concern for children and their extensive

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1. This brief is being filed with the consent of both parties. Copies of the consent letters are on file with the Clerk of the Court.

experience in working with troubled youth. It is the hope of Amici that their insights into the unique nature of childhood and the attributes of children will be of assistance to the Court in resolving the difficult issues raised in this case.

The Child Welfare League of America is an association of over 450 leading child welfare agencies in the United States and Canada and 1,200 affiliates in twenty seven state associations, devoted to improving services for deprived, neglected, and abused children. Child Welfare League includes in its membership both public and voluntary, as well as both religious and non-sectarian agencies.

The National Council on Crime and Delinquency is a non-profit corporation that conducts research, recommends national juvenile justice standards, and works with

correctional and juvenile court professionals and citizens' groups to improve the quality of the criminal and juvenile justice systems.

The Children's Defense Fund (CDF) is a national public charity that represents and advocates on behalf of low-income minority and handicapped children. CDF strives for preventive intervention before youth drop out of school, suffer family break-down or get into trouble. CDF also addresses the special needs of troubled youth in the child welfare, juvenile justice, and mental health systems.

The National Association of Social Workers (NASW), a non-profit professional association with over 100,000 members, is the largest association of social workers in the United States. NASW is devoted to promoting the quality and effectiveness of

social work practice and to improving the quality of life through utilization of social work knowledge and skills.

The National Black Child Development Institute (NBCDI) is a non-profit organization dedicated to improving the quality of life for Black children and youth. NBCDI's network of affiliates provides services such as finding adoptive homes for Black children and providing tutoring and leadership training for youth, and its volunteers help educate their communities about national, state, and local issues facing Black youth.

The National Network of Runaway and Youth Services, Inc., is a membership organization of over 1000 community-based youth-serving agencies, which serves as a communication, information and public education exchange on issues affecting

youth, advocates on behalf of vulnerable youth and their families, and conducts research and demonstration projects.

The National Youth Advocate Program, Inc. (NYAP) is a private non-profit youth advocacy and direct-service organization, which is responsible for developing and providing a range of individualized, flexible and innovative community-based programs for very troubled and needy youth as an alternative to institutionalization. NYAP has had considerable success in working with older adolescents with very serious needs and behavior problems.

The American Youth Work Center, a Washington-based organization that promotes improvement of services to children at risk, holds national and international training conferences and prepares reports on issues relating to youth services.

SUMMARY OF ARGUMENT

Amici's lengthy experience in counseling and rehabilitating troubled youth compels the conclusion that no person should ever be executed for an offense committed while under the age of eighteen years.

Amici begin by demonstrating the unavailability of the conclusion that the Eighth Amendment establishes safeguards against the execution of children. The hypothetical of a ten-year-old murderer is used to demonstrate that the execution of a young child would not serve any of the penological goals underlying the use of capital punishment.

Amici then draw on their knowledge of adolescents to demonstrate that the same factors that render capital punishment unconstitutional for very young children

render it equally improper for all children below the age of eighteen. This discussion of the indefensibility of distinctions between sub-classes of children also draws on this Court's decisions in the field of juvenile rights, showing that the constitutional analysis established in these decisions does not tolerate an artificial demarcation between age-groups of children with respect to the imposition of capital punishment. The analysis of the indivisibility of the class of children concludes by showing that, even assuming arguendo that viable distinctions could be drawn between sub-classes of children, certainly the mechanisms that are used to transfer juveniles to adult court could not possibly serve that classification function.

Amici then call on their knowledge of

youthful offenders to show that even extremely violent youth are capable of rehabilitation when provided with appropriate services. It would not only be senseless, but fundamentally inhumane, to extinguish the lives of young people who could grow into productive and responsible members of society.

Finally, Amici show that the trend both in the United States and in the civilized world is decidedly against execution of persons under eighteen. To their shame, several states in this country still allow the execution of persons under eighteen, even when the evolving standards of decency throughout the world prohibit such executions.

ARGUMENT

I.

The Eighth Amendment Self-Evidently Prohibits the Execution of Children, and There Is No Constitutionally Viable Basis For Drawing The Line Of Adulthood At Any Point Other Than Age Eighteen

A. The Eighth Amendment Clearly Precludes The Execution Of Children

During oral argument in Eddings v. Oklahoma, 455 U.S. 104 (1982), the State of Oklahoma conceded that the Eighth Amendment would not tolerate the imposition of a sentence of death upon a ten-year old. Transcript of Oral Argument, Eddings v. Oklahoma, supra, at page 28. This was conceded, notwithstanding the fact that the Oklahoma death penalty statute then and now does permit sentences of death for children of any age. See Okla. Stat. Ann. tit. 21, §§ 701.9(A), 701.10 - 701.12 (West 1983).

It is useful, however, to use the hypothetical posited by the Oklahoma

Attorney General -- the execution of a ten year old² -- to examine the precise nature of the constitutional imperatives concerning capital punishment for children.

If Petitioner were ten years old, there is little doubt that this Court would determine that his death sentence was prohibited by the Eighth Amendment. Such a case would make glaringly apparent the conclusion (which we will later demonstrate is equally true for older juveniles as

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2. The scenario discussed, the execution of a ten-year-old, is, unfortunately, not a purely speculative one. There have, in fact, been two ten-year-olds who have been executed in this country: James Arcene, A Cherokee Indian child who was hanged in Arkansas in 1885; and a Black child, whose name was not preserved in the records, who was hanged in Louisiana in 1855. Streib, Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen, 36 Okla. L. Rev. 613, 620 (1983).

well) that execution of a child would not contribute measurably to either of the "two principal social purposes" of capital punishment: "deterrence of capital crimes by prospective offenders" and "retribution." Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion).

This Court concluded in Gregg, supra, that "the death penalty undoubtedly is a significant deterrent" for many criminals. 428 U.S. at 185-86. When this Court spoke in Gregg of the quintessential type of murderer who might be deterred by capital punishment -- the "murder[er] for hire" who engages in a "cold calculus ... preced[ing] the decision to act," id. at 186, the Court presumably envisioned a perpetrator who was a sophisticated adult. With respect to those murderers and other adult murderers, it seems quite clear that the expansion of

the range of the death-eligible population to include ten-year-olds would not contribute even marginally to the goal of deterring adults from committing capital crimes.

Thus, the only population that could even conceivably be deterred by the inclusion of ten-year-olds in the death-eligible population would be other children in the same age range. But, in fact, the execution of a ten-year-old would not deter other young children from homicide, for such children do not have the ability to make rational judgments about their behavior. Ruled by their feelings, extraordinarily dependent upon their parents for protection and guidance and survival, and emotionally bound to their families, young children's "judgments" are the products of family dynamics and emotion, rather than the considered assessment of alternative

courses of behavior. Thus, a ten-year-old would be likely to kill someone (or at least to attempt it) if the homicide seemed necessary to the aid and comfort of his family or if it seemed that the family would condone or approve it. The threat of death would no more deter such a child than it would "those [adults] who act in passion for whom the threat of death has little or no deterrent effect." Gregg v. Georgia, supra, 428 U.S. at 185.

Similarly, the execution of a ten-year-old would not satisfy society's need for retribution. Ten-year-olds do not yet have the capacity to function as moral beings, able to evaluate their behavior in light of socially accepted values. They do not yet know the standards for appropriate behavior within the society in which they live, and thus cannot evaluate the approp-

riateness of their own behavior. Instead, ten-year-olds are profoundly dependent upon their parents and their family to define for them the boundaries of the appropriate. For that reason, condemnation of ten-year-olds makes no contribution to society's need for retribution.

As this Court has stated, "retribution as a justification for [the death penalty] ... very much depends upon the degree of [the defendant's] culpability." Enmund v. Florida, 458 U.S. 782, 800 (1982). Most recently, the Court observed that "the critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." Tison v. Arizona, 55 U.S.L.W. 4496, 4501 (U.S., April 21, 1987). The ultimate sanction of death is reserved for those who engage in

acts of "intentional wrongdoing" (Enmund, supra, at 800) and "purposeful ... criminal conduct" (Tison, supra, at 4501): those individuals who intentionally kill or who "knowingly engag[e] in criminal activities known to carry a grave risk of death." Id. at 4502. But ten-year-olds lack the independent ability to know the moral implications of their behavior, and thus cannot form the "highly culpable mental state[s]" (id. at 4502) that warrant the retributive imposition of the death penalty.

Finally, the execution of a ten-year-old is not warranted by the penological justification of incapacitation. The need for incapacitation arises only if the likelihood that an offender will kill again is so great that imprisonment will not suffice to protect other people. See

generally Gregg v. Georgia, 428 U.S. at 183, n.28. It is unthinkable that such a need could exist with respect to a ten-year-old. Such a child is hardly more than a hint of what he or she will become as an adult. The potential to grow into a morally responsible, productive adult is unlimited in such a child. With positive support and education, a ten-year-old child can as fully leave behind the emotions and behaviors that led that child to kill as the butterfly leaves behind the cocoon. There simply cannot be a legitimate need to incapacitate a ten-year-old child with the finality of death. As observed by the Supreme Court of Kentucky with respect to a child older than ten:

[I]ncorrigibility is inconsistent with youth; ... it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life.

Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968).

For these reasons, the critical question presented by petitioner's case is not whether the Eighth Amendment forbids the execution of children below a certain age. As the hypothetical of the ten-year-old amply illustrates, the Eighth Amendment surely shelters children below a certain age from the ultimate punishment. The crucial question in this case is what that age should be. As the following sections will show, the prior decisions of this Court and the practical realities of the juvenile justice system dictate that the line must be drawn at the age of eighteen.

B. There Is No Viable Basis For Distinguishing Among Juveniles For Purposes Of Administration Of The Death Penalty

The quandary of line-drawing among minors is, of course a dilemma that this

Court has faced on prior occasions. In numerous cases, in numerous factual contexts, this Court has consistently sounded a single, overarching theme: that children -- simply by virtue of their status of minors -- can be deprived of the rights and privileges of adults. This Court's decisions sanctioning legal disabilities for minors treat juveniles as a coherent class, and establish the age of majority as the demarcation between the period of childhood and the period of adulthood.

In Ginsberg v. New York, 390 U.S. 629 (1968), this Court considered whether a state statute prohibiting the sale of sexually explicit (albeit non-pornographic) material to all persons under the age of seventeen violates the First Amendment. Without distinguishing between mature and

immature minors, this Court held that a state can constitutionally treat the general class of minors differently from the way it treats the general class of adults. In a passage that has frequently been reiterated by this Court, Justice Stewart expressed the generalization that children are "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." Id. at 649-650 (Stewart, J., concurring) (footnotes omitted).

In Parham v. J.R., 442 U.S. 584 (1979), this Court once again applied a generalization about children, this time in the context of involuntary civil commitment of children by their parents. In rejecting the claim that the commitment statute unconstitutionally discriminated against persons on the basis of their young age,

the Court observed that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions." Id. at 603.

In this Court's most recent ruling on the rights of juveniles accused of crime, Schall v. Martin, 467 U.S. 253, 265 (1984), the Court again treated childhood as a unique status, that differentiates all children from all adults. Rejecting a challenge to the constitutionality of a statute that authorizes preventive detention for juveniles, the Court observed that juveniles do not possess the qualities of self-restraint and maturity that are the basic presuppositions upon which the right to pre-trial liberty rests. Id. at 265 (preventive detention can be imposed in order to protect "the juvenile from his own folly").

It is instructive to consider the context in which this Court has previously decided questions of juvenile law. Typically, the question that is presented is whether a certain juvenile, or class of juveniles, is sufficiently mature or sophisticated to be treated as an adult and freed of a statutory or administrative restriction that affects all young people. This Court has repeatedly rejected such attempts to draw distinctions between subgroups of minors, and instead has relied on generalizations about the unique nature of childhood and the universal characteristics of children, to treat minors as a single coherent class. See, e.g., Schall v. Martin, supra, 467 U.S. at 265 ("[c]hildren, by definition, are not assumed to have the capacity to care for themselves"); Prince v. Massachusetts, 321 U.S. 158, 168

(1944) (upholding the state's right to restrict a minor's employment opportunities because "[t]he state's authority over children's activities is broader than over like actions of adults").

The series of decisions addressing the privacy rights of a young woman to an abortion constitute the only factual context in which this Court has tolerated any line-drawing on the basis of the relative maturity or immaturity of individual youths. See Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 443 U.S. 622 (1979); H.L. v. Matheson, 450 U.S. 398 (1981). However, the Court has permitted line-drawing only in order to avoid irrevocable harm. In Bellotti v. Baird, the Court recognized that "considering her probable education, employment skills,

financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor." 443 U.S. at 642. Accordingly, the Court struck down a parental veto statute that would have imposed the "grave and indelible" consequences of "unwanted motherhood" upon mature minors who were capable of rationally considering the alternatives. Id.

Unlike the prior cases involving juvenile rights, where an individual juvenile (or a litigant acting on behalf of the juvenile) sought to divide artificially the general class of children into subclasses of mature and immature children for the sake of expanding mature minors' rights, here it is the State that is asking the Court to engage in such artificial line-drawing. The State asserts, in effect, that certain juveniles are suffi-

ently mature and sophisticated so as to fall outside the general category of youth and be subjected to the perquisites (here, the penalties) of adulthood. Significantly, the State has not offered any proposals for the dividing line between juveniles, that could serve as an alternative to the age-eighteen threshold proposed by amici. Nor has the State, through its legislature, even set statutory parameters to define the range of ages of children that could be eligible for capital punishment. Notwithstanding the Oklahoma Attorney General's disavowal of executions of ten-year-olds in the oral argument in Eddings v. Oklahoma, supra, the State is here defending its right to maintain a statute that permits the executions of ten-year-olds and even younger children. In essence, the State is seeking carte blanche to define maturity on

a case-by-case basis, without any statutory or constitutional restrictions or guidance concerning the decisions that will be made in the individual cases.

The case-by-case decisionmaking urged by the State cannot be squared with this Court's prior decisions in the area of juvenile rights. There can be no justification for employing a "ratchet" analysis that forbids case-by-case decisionmaking for the sake of expanding juvenile rights while employing that very same form of decisionmaking for the sake of extinguishing the greatest of all rights, the right to life. This case certainly does not fall within the single exception which this Court, in the abortion cases, carved in its general approach of treating all minors as a coherent class. Unlike the abortion cases, there are no "grave" or "indelible"

consequences to anyone -- not the State and certainly not the minor -- in failing to permit minors to be executed.

In addition to demonstrating the impermissibility of sub-dividing the general class of minors, this Court's prior caselaw on juvenile rights has yet further relevance to the present case. The qualities that this Court has associated with the period of childhood -- and that the Court has relied upon in denying rights to minors -- are the very attributes that would render the death penalty irrational and unjustifiable when applied to children. In Eddings v. Oklahoma, supra, the Court observed that minority "is a time and condition of life when a person may be most susceptible to influence and to psychological damage" and that adolescents "generally are less mature and responsible than

adults." 455 U.S. at 115-16. In Eddings, this Court furthermore stated, quoting from the report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders:

'[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.'

455 U.S. at 115 n.11. In Haley v. Ohio, 332 U.S. 596, 599 (1948), this Court referred to the "period of great instability which the crisis of adolescence produces." In Bellotti v. Baird, supra, notwithstanding the distinction drawn between mature and immature minors, the Court spoke in broad terms of the general class of minors as "often lack[ing] the

experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." 443 U.S. at 635.

The experience of Amici in working with adolescents amply supports these observations about the period of adolescence. The stage of developmental growth known as adolescence frequently is characterized by: impulsivity and inability to exercise self-restraint; inability to consider the future consequences of one's actions; the false confidence generated by feelings of omnipotence; inadequate judgment, in part because of the lack of sufficient life experience to provide a perspective or broader context for evaluating events; susceptibility to the influence of peers, partly because of the lack of sufficient confidence in one's own identity; and finally, boundless potential

for change, since the personality that the individual will have as an adult is still in the process of being formed.

These typical attributes of adolescence have an obvious bearing on the assessment of whether executions of juveniles could possibly serve the penological goals of capital punishment. Because many adolescents act impulsively without a "cold calculus ... preced[ing] the decision to act," Gregg v. Georgia, supra, 428 U.S. at 186, they are no more subject to deterrence than are their ten-year-old counterparts. The retribution rationale is equally inapplicable: adolescents "'deserve less punishment because [they] may have less capacity to control their conduct and to think in long-range terms than adults.'" Eddings v. Oklahoma, supra, 455 U.S. at 115 n.11 (quoting Twentieth Century Fund Task

Force on Sentencing Policy Toward Young Offenders). The retribution rationale also is less applicable to juveniles because "youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." Id. Finally, because adolescents are still malleable and may develop very different personalities and values as they gain experience and perspective, it is impossible to conclude definitively that a particular youth must be executed in order to incapacitate him or her from committing future crimes. Indeed, the social scientific literature and the experience of amici demonstrate that many violent adolescents can be rehabilitated. See pp.43-52 infra.

The foregoing discussion of the attri-

butes of adolescence does not suggest, of course, that every single adolescent necessarily shares the qualities which typify the period of adolescence. Quite obviously, individual adolescents vary markedly in their degree of maturity, self-control, and judgment. The attainment of adult levels of maturity and judgment may occur at very different ages, depending upon the individual youth's prior experiences, education, and support network of parents and friends.

What the Court is being asked in this case is whether there is a single age of childhood, at which it can be said that adolescents no longer suffer from the impulsivity and other qualities of adolescence that render the use of capital punishment unjustifiable. The experience of amici demonstrates that there is no "magic age" at which all adolescents will

necessarily attain the maturity and sophistication that are associated with adulthood. There simply is no viable basis for establishing categorical demarcations among age-groups of adolescents.

The only principled distinction between children and adults in the context of capital punishment is the very same distinction that this Court has repeatedly used in defining the rights of minors: the age of majority. For this reason, the Court should rule that children below the age of eighteen³ cannot be executed.

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3. Although the states vary somewhat in the age designated as the "age of majority", virtually all states, including Oklahoma, employ age eighteen as the age of majority. See Okla. Stat. Ann. tit. 15, § 13 (West 1983); see generally M. Guggenheim & A. Sussman, The Rights of Young People 187, 290-91 (2d ed. 1985) (listing the age of majority for every state).

C. Even Assuming Arguendo That There Were A Principled Basis For Distinguishing Among Juveniles In The Capital Sentencing Context, Currently Existing Mechanisms For Transferring Juveniles To Adult Court Do Not Provide A Viable Basis For Such Principled Decision-making

At the present time, the only factor that separates juveniles eligible for capital punishment in Oklahoma from those who are exempt from the ultimate sanction is the process of transfer to adult court. In Oklahoma, as in virtually all states, juveniles can be transferred to adult court for prosecution as adults. See generally S. Davis, Rights of Juveniles: The Juvenile Justice System, § 4.1 (1986). Since all juveniles who are prosecuted in adult court in Oklahoma are eligible for the death penalty, regardless of their age, the process of transfer to adult court in effect serves as the process for defining the death-eligible class of juveniles.

The question, then, is whether the statutory mechanism for transfer to adult court is a viable mechanism for "legislative[ly] defin[ing] . . . [and] circumscrib[ing] the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 878 (1983).

The hypothetical of the ten-year-old murderer is once again useful in demonstrating the precise workings of the system. If transfer were a rational mechanism for defining the death-eligible class, then it would necessarily filter this youth out of the class of death-eligible youths transferred to adult court. In fact, however, depending upon the facts of the case, this ten-year-old very well might end up in adult court. Many youths are transferred to adult court because their rehabilitative needs are so great

that the youths are unlikely to complete the regimen of rehabilitative services during the limited number of years that a child can remain within a facility for juvenile delinquents. See S. Davis, supra, § 4.3, at 4-16. Thus, the most irrational of results is produced: the rehabilitative potential of a youth does not exempt a youth from eligibility for the death penalty and, instead, serves as the predicate for placing him or her at risk of receiving a death sentence.

The explanation for this irrational course of events is readily apparent when one examines the precise nature of the transfer standards used in Oklahoma (as well as other states), and compares them with the criteria which are constitutionally necessary for identifying the class of persons eligible for capital punishment.

Unlike the "determination of [moral] culpability required in capital cases," Tison v. Arizona, supra, 55 U.S.L.W. at 4501, transfer statutes are not primarily concerned with the moral culpability of the offender. Nor do transfer statutes purport to assess whether juveniles possess the maturity and sophistication of adults. Rather, transfer statutes have the central goal of identifying and transferring to adult court those "youthful offenders who cannot benefit from the specialized guidance and treatment [i.e., "the special features and programs"] contemplated by the [juvenile court] system." Breed v. Jones, 421 U.S. 519, 535 (1975); see generally S. Davis, supra, § 4.3, at 4-15 ("In making a waiver determination the juvenile court judge is called upon to decide whether the child is amenable to the treatment and

rehabilitation afforded by the juvenile processes."). Accordingly, a youth like the ten-year-old could be transferred to adult court, simply because there are no suitable local juvenile programs, even though this child possesses neither the moral culpability demanded for the imposition of a death sentence nor the maturity and sophistication of an adult.

The actual effect of these principles is illustrated by examining the Oklahoma standards for transfer. Although the Oklahoma transfer statute's roster of factors to consider includes the ability to appreciate wrongfulness, Okla. Stat. Ann. tit. 10, § 1112(b)(3) (West. 1983), the Oklahoma Court of Criminal Appeals has expressly declared that maturity is not a prerequisite for transfer to adult court. In Sherfield v. State, 511 P.2d 598, 601

(Okla. Crim. App. 1973), the court stated:

The contention that before there can be a proper certification [to adult court] there must be a showing that the juvenile had advanced emotional maturity and a behavior pattern greater than his chronological age is, in our view, without foundation in the provisions of the Juvenile Act.

The state court held that neither the certification statute nor the Constitution calls for a demonstration that the juvenile "know[s] right from wrong as would a nineteen or twenty-one year old person." Id. at 602. Accord, Matter of Smith, 548 P.2d 647, 648 (Okla. Crim. App. 1976) ("reiterat[ing] that the maturity and age of the juvenile are but one consideration" and that a finding of maturity is not an indispensable predicate for transfer).

The Oklahoma Court of Criminal Appeals' decision in Matter of Sanders, 564 P.2d 273 (Okla. Crim. App. 1977), approving

the transfer of two youths to adult court, is the quintessential case of the transfer system's classification of rehabilitative potential as an aggravating, rather than mitigating, factor for purposes of the transfer determination. In Sanders, two seventeen-year-old youths were transferred to adult court in part because they needed more years of treatment than could be provided in a juvenile court system that must discharge youths when they attain the age of majority. Thus, the potential for rehabilitation, rather than preventing transfer, served as the predicate for the transfer. The additional reason for the transfer in Sanders -- the absence of local rehabilitative facilities with adequate security measures for serious felons -- demonstrates that the transfer system is often more concerned with the suitability

of local programs than with the offender's moral culpability, lack of potential for rehabilitation, or even emotional maturity.

Finally, it has been the experience of amici that the transfer system does not even serve as a reliable mechanism for sifting out the most dangerous offenders or the most heinous crimes. Rather, transfer is routinely used as a vehicle for ridding the juvenile court of the most obstreperous recidivists who have exhausted the resources and patience of juvenile court staff.

Thus, the transfer system does not ask any of the questions necessary for rationally "'distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" Gregg v. Georgia, supra, 428 U.S. at 188 (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)). The use of the

transfer process as a mechanism for defining the death-eligible population of children would truly render the death penalty "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Furman v. Georgia, supra, 408 U.S. at 309 (Stewart, J., concurring).

II.

The Execution of Children Would Violate The "Standards of Decency" That Have Evolved In This Country and Abroad

A. Execution of A Child Is Fundamentally Inconsistent with National Views, As Manifested In Policies For Treatment Of Troubled Youth

This Court has repeatedly recognized that the punishment of death is unique in its finality and irrevocability. E.g., Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). By its very nature, a sentence of death constitutes society's rejection of

the possibility of "rehabilitation of the convict." Furman v. Georgia, supra, 408 U.S. at 306 (Stewart, J., concurring).

Amici are united in their belief that the irrevocable sentence of death must not be imposed upon children, who, simply by virtue of their tender age and their still-evolving personalities, are inherently capable of being rehabilitated over time.

The juvenile justice system in this country was founded upon two central philosophical premises: (i) that children who commit crimes should be helped rather than punished, because these children lack the maturity and sense of responsibility of adults; and (ii) that children, because of their youth and malleability, are more likely subjects for successful intervention than older and, presumably, more hardened offenders. See In re Gault, 387 U.S. 1,

15-16 (1967); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 2-3, 9 (1967).

The mere fact that a youth has been transferred to adult court does not necessarily signify that s/he is no longer malleable or capable of benefitting from some form of rehabilitation. As explained earlier, the need for a lengthy period of rehabilitation may even be the reason for the transfer.

The commission of a homicide also does not necessarily render a youth beyond redemption. The available data on juveniles convicted of homicide indicates that carefully structured correctional and community-based programs can result in the rehabilitation of these serious offenders. A two-year follow-up of homicide offenders

paroled from the California Youth Authority (CYA) in 1984 showed that 76.7 % of these offenders successfully completed their period of parole, while CYA parolees who had been convicted of non-homicide offenses had a parole success rate of only 41.9 %. California Youth Authority, Offender-Based Institutional Tracking System (1987). A study of chronic and violent juvenile offenders in Ohio similarly found that approximately 60 % of youths who were charged with murder in juvenile court were not subsequently re-arrested as adults. D. Hamparian, R. Schuster, S. Dinitz & J. Conrad, The Violent Few (1977).

The experience of Amici in working with young people confirms these social science findings on the malleability and inherent rehabilitative potential of even violent youth. The populations served by

amici range from extremely young, neglected children to violent delinquents on the verge of adulthood. The vast majority of these children currently suffer, have in the past suffered, or will in the future suffer from the "failure of family, school, and the social system," which lead to "youth crime." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978) (quoted in Eddings v. Oklahoma, supra, 455 U.S. at 115 n.11). Amici have repeatedly found that these children can be taught to adopt society's norms, precisely because juvenile crimes grow out of the "[a]dolescent[']s ... vulnerab[ility], ... impulsivi[ty], and ... [lack of] self-discipline[]." Id.

An examination of a few actual case histories provides the clearest possible

illustration of the rehabilitative potential that even extremely violent youth possess:

(i) A girl whom we will call Dora (real name withheld to preserve confidentiality), grew up in Washington D.C., raised by parents who were drug sellers and addicts. Starting when Dora was eight years old, her parents used her as a courier in their drug trade. When Dora was fourteen years old, she killed her boyfriend by shooting him in the back. When Dora was seventeen, she committed an armed robbery, in which she pistol-whipped the victim. At the age of eighteen, Dora committed another homicide, again of a boyfriend. Dora was removed from her community, and sent to a residential facility in California. She graduated successfully from the program and has remained crime-free for the past seven years. Today she is twenty-six years old, still living in California, living with a man who is gainfully employed as the manager of a small store, and raising two children.

(ii) Kevin, a sixteen-year-old who resided in the Roxbury section of Boston, committed a series of robberies while armed with a knife. During one of these armed robberies in 1974, he gratuitously stabbed a senior citizen. Kevin was convicted in juvenile court of armed robbery and assault and battery by means of a dangerous weapon, and then, pursuant to the procedure that prevailed in

Massachusetts at the time, the Commonwealth attempted to transfer him to adult court for re-prosecution as an adult. The transfer was prevented by this Court's intervening decision in Breed v. Jones, 421 U.S. 519 (1975). Kevin was sent to a community-based non-residential treatment program for juveniles. The program provided intensive special educational services appropriate for his mild mental retardation, and provided counseling to deal with his low self-esteem, inadequate home life, and negative peer group. Kevin successfully graduated from the program after one year. Since that time, he has remained crime-free.

(iii) Michael, a fifteen-year-old boy who lived in Washington, D.C., killed his step-mother with an axe, dismembered her body and put it in the dust-bin. He was convicted in juvenile court in 1964, and sentenced to the juvenile detention facility for an indeterminate period. He remained in the facility for 4 years and was released when he was nineteen years old. While he had been incarcerated in the facility, he received a variety of rehabilitative services and, most significantly, established a relationship of trust with a recreation counselor, with whom he maintained contact even after leaving the facility. Upon returning to the community, Michael finished school and then obtained employment in an air conditioning installation company. He subsequently married, settled in a working class apartment project, and raised a child. As of his last contact

with the recreation counselor, which occurred in 1980, he had remained crime-free and was still employed and happily married.

(iv) Edward Harrison (real name being used with consent) was seventeen years old when he committed a felony murder, shooting the victim with a sawed-off shot-gun during the commission of a robbery. The crime took place in Washington D.C. in March of 1960. Eddie was charged as an adult with first-degree murder, convicted, and sentenced to death. While Eddie was on death row awaiting execution, having waived his right to appeal, it was discovered that his trial attorney had been practicing law without a license. Accordingly, Eddie's conviction was reversed and he was re-tried. He was once again convicted, but because the death penalty was no longer in effect, Eddie was sentenced to life imprisonment. The conviction was again overturned on appeal, Eddie was again re-tried and again sentenced to life imprisonment. However, during the eight-and-a-half years that Eddie had spent in prison pending appeals and re-trials, he had become involved in arranging rehabilitative programs for himself and other inmates. Through the support of prison staff and a local judge, Eddie was released pending appeal and became involved in designing rehabilitative programs for delinquent youth. His conviction was eventually upheld on appeal, but, as a result of the progress he had achieved, his sentence was commuted by President Nixon. Since Mr.

Harrison's release from prison in 1968, he has devoted his life to programs for youth. Now 44 years old, he is the executive director of a Baltimore-based program for pre-trial diversion for delinquent youth, which Mr. Harrison himself created and initiated with the aid of a federal grant, and which now is an established Maryland state program. Mr. Harrison also is the vice-chairman of the Maryland Juvenile Justice Advisory Council, and has testified before Congress on issues relating to youth and delinquency.

There are of course numerous other success stories that could be cited. The four that have been presented, were selected because they each involved a murder or, in the case of Kevin, a lethal act that fortuitously did not end in a death. The same remarkable transformation that occurred in each of these cases has been replicated in numerous other cases of equally serious crimes as well as less serious crimes. The successes are usually due to the quality and creativity of the rehabilitative facility. For example, the

House of Umoja in Philadelphia has experienced remarkable successes in reforming members of violent youth gangs, for more than a decade. See R. Woodson, A Summons to Life: Mediating Structures and the Prevention of Youth Crime (1981); Fattah, "Call and Catalytic Response: The House of Umoja," in Violent Juvenile Offenders: An Anthology 231 (1984). The Glen Mills School in Concordville, Pennsylvania, has also had remarkable successes in reforming extremely violent delinquents, through a combination of superb academic, vocational training, and athletic programs, as well as a variety of creative measures designed to build self-esteem. For example:

Richard, a fifteen-year-old who was convicted of first-degree felony-murder in the West Virginia juvenile court, was placed in the Glen Mills School in March of 1984. During the period of almost three years that Richard remained at Glen Mills, he received special education classes and vocational training in a

variety of marketable skills, and he participated in student government and varsity sports. During his final seven months at the school, Richard was placed in a day-time job in a local furniture store, where he could apply the wood-working skills he had learned at the school. Richard was released in January of 1987 and is now living with his sister in Ohio and complying with all of the conditions of his probation. He is presently looking for employment in the furniture construction trade, and, in the interim, is working in a restaurant.

Developments in corrections policies in recent years provide the promise of continued, and possibly even increased, successes in the reformation of violent youth. In January of 1980, the Federal Office of Juvenile Justice and Delinquency Intervention initiated a nation-wide research and development effort to identify the most effective intervention strategies for rehabilitating violent juvenile offenders. See Fagan, Rudman & Hartstone, "Intervening with Violent Juvenile Offenders: A Community Reintegration

Model," in Violent Juvenile Offenders: An Anthology, supra at 207-09. The preliminary results of this national research effort indicate that recidivism can be significantly reduced through a regimen of a short period of confinement in a small secure facility with intensive staff support, followed by the provision of carefully planned services upon the youth's re-entry into the community. See Krisberg, "Preventing and Controlling Violent Youth Crime: The State of the Art," in I. Schwartz, Violent Youth Crime: What Do We Know About It and What Can Be Done About It (1987). See also P. Greenwood & F. Zimring, One More Chance: The Pursuit of Promising Intervention Strategies for Chronic Juvenile Offenders (1985).

The available evidence indicates that all adolescents, regardless of whether they

committed very violent offenses or less serious crimes, are capable of rehabilitation. It is precisely for this reason that rehabilitation has been the central guiding theme of the juvenile justice system. The mere fact that a youth has been transferred to adult court does not eliminate the malleability of the childhood personality or obliterate the youth's potential for rehabilitation. National standards of civilized and humane justice, and the national understanding of adolescent behavior, demand that that promise of rehabilitation not be forever foreclosed through the irrevocable act of execution.

B. Execution of A Child Is Fundamentally Inconsistent With National Views, As Manifested In Objective Indicia Such as Legislative Pronouncements And Jury Verdicts

As this Court has repeatedly recognized, the judgments of legislators, as

reflected in the statutes they enact, and the views of jurors, as evidenced by the verdicts they return, are relevant to the assessment of the "evolving standards of decency" that lie at the core of the Eighth Amendment's proscription against cruel and unusual punishment. See, e.g., Enmund v. Florida, supra, 458 U.S. at 789-96; Coker v. Georgia, 433 U.S. 584, 593-97 (1977); Gregg v. Georgia, supra, 428 U.S. at 179-182. Both the judgments of legislators and the views of jurors support the conclusion that children should be exempt from the ultimate punishment of execution.

In twenty-six jurisdictions in the United States today, no child under the age of eighteen may be executed. This includes: fourteen states and the District of Columbia, which prohibit capital punishment of adults and juveniles alike as

unconscionable; and eleven states which, although tolerating capital punishment for adults, exempt children under the age of eighteen from the imposition of the death penalty.⁴ In an additional two states, no child under the age of seventeen may be put to death.⁵ Thus, in only twenty-three

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4. The eleven states which set the minimum age for eligibility for capital punishment at age eighteen, are: California (Cal. Penal Code § 190.5 (1985)); Colorado (Col. Rev. Stat. § 16-11-103(1)(a) (1986)); Connecticut (Conn. Gen. Stat. Ann. § 53a-46a(g)(1) (1985)); Illinois (Ill. Ann. Stat. Ch. 38, § 9-1(b) (Smith-Hurd Supp. 1985)); Maryland (adopted on April 13, 1987; see Washington Post (April 14, 1987), at A1, A7); Nebraska (Neb. Rev. Stat. § 28-105.01 (1985)); New Jersey (N.J. Stat. Ann. § 2C:11-3f (West Supp. 1986)); New Mexico (N.M. Stat. Ann. § 31-18-18 (1979)); Ohio (Ohio Rev. Code Ann. § 2929.02(A) (1982)); Oregon (Ore. Rev. Stat. § 161.620 (1985)); and Tennessee (Tenn. Code Ann. § 37-1-134(a)(1) (1984)).
 5. See Ga. Code Ann. § 17-9-3 (1982); Tex. Penal Code Ann. § 8.07(d) (Vernon Supp. 1987).

jurisdictions, would it be possible to take the life of someone for an act committed while he or she was sixteen-years-old or younger.

Even more significant to the assessment of the evolution of national standards of decency is the fact that recent state legislative proceedings demonstrate a clear trend of increasing recognition of the unconscionability of executing children. Nebraska and Ohio established prohibitions against the execution of children under the age of eighteen in 1982. See Neb. Rev. Stat. § 28-105.01 (1982); Ohio Rev. Code Ann. § 2929.02(A) (Page 1982). Colorado and Oregon followed suit in 1985, and New Jersey in 1986. See Colo. Rev. Stat. § 16-11-103(1)(a) (1986); Ore. Rev. Stat. § 161-615 (1985); N.J. Stat. Ann. § 2C:11-3f (West Supp. 1986). On April 13, 1987, the

Maryland legislature joined the growing trend by also adopting age eighteen as the minimum age for capital punishment. Washington Post (April 14, 1987), at A1, A7. Thus, it seems clear that the minority of states permitting execution of a child will, in coming years, be an ever-decreasing minority.

Model legislation and criminal justice standards also support a ban on executions of children below the age of eighteen. The Model Penal Code, which the Court considered in gauging the constitutionality of capital punishment in Gregg v. Georgia, supra, 428 U.S. at 191, 193, recommends that children below the age of eighteen be deemed ineligible for capital punishment. See American Law Institute, Model Penal Code § 210.6 (Official Draft 1980). The National Commission on the Reform of

Criminal Law similarly called for a prohibition against execution of children below the age of eighteen. National Commission on the Reform of Criminal Law, Final Report on the New Federal Code § 3603 (1971). The American Bar Association, which has never before taken a formal position on any aspect of capital punishment, adopted a resolution in 1983 opposing "the imposition of capital punishment upon any person for any offense committed while under the age of eighteen." American Bar Association Report No. 117A (approved in August, 1983).

As this Court has recognized, juries are "a significant objective index of contemporary values." Gregg, supra, 428 U.S. at 181; accord, Enmund v. Florida, supra, 458 U.S. at 795. In the present decade, juries have returned verdicts of

death only rarely when the defendant was a minor. See Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Cleve. St. L. Rev. 363, 384 (1986) (as of December, 1983, children under age eighteen constituted only 2.9 % of the death row population of 1,289 persons). Moreover, as the imposition of death sentences for adults has continued to grow, the rate of death sentences for minors has decreased. Id. (from December 1983 to July 1986, adult population of death row increased by 42 % (from 1,250 to 1,770), while juvenile population decreased by 16 % (from thirty-eight to thirty-two); juveniles accounted for only 1 % of the approximately 700 death sentences imposed from December, 1983, to March, 1986).

Thus, the objective criteria of contemporary values in this country clearly

militate against the imposition of the death penalty upon children under the age of eighteen.

C. Execution of Children Has Been Condemned And Rejected By Most Of The Civilized World

In deciding whether imposition of the death penalty constitutes "cruel and unusual punishment" within the meaning of the Eighth Amendment, this Court also has looked to the "'climate of international opinion.'" Enmund v. Florida, *supra*, 458 U.S. at 796 n.22; Coker v. Georgia, *supra*, 433 U.S. at 596 n.10. The overwhelming consensus of modern opinion in the Western World supports Amici's view that state-sanctioned executions of children are cruel, inhumane, and contrary to the rehabilitative and protective attitudes which the law otherwise manifests towards children.

Three major international human rights treaties expressly prohibit the death penalty for children below the age of eighteen. See International Covenant on Civil and Political Rights, Article 6(5), in Multilateral Treaties Deposited With the Secretary General of the United Nations, at 124, U.N. Doc. ST/LEG/Ser. E/3 (1985); American Convention on Human Rights, Article 4(5), in Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OEA/Ser. L/V/II, 65, Doc. 6, July 1, 1985, at 63; Geneva Convention for the Protection of Civilians in Time of War, Article 68; see generally Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 Cin. L. Rev. 655 (1983).

Over eighty nations, including the

vast majority of western European nations, have either abolished the death penalty altogether or have forbidden it for children and adolescents. Id. at 666 n.44. Even among the eighty-one nations that do permit executions of children, there were only two juveniles who were actually put to death during the decade from 1973-82. Id. at 666-67 n.44. Reports of the Secretary General of the United Nations confirm that "the great majority of Member States report never condemning to death persons under eighteen years of age." See United Nations Economic and Social Council (UNESCO), Report of the Secretary General on Capital Punishment at 10, UN. Doc. E/5242 (1973).

Thus, it is clear that most of the civilized world has recognized the important developmental differences which distinguish adolescent children from

adults, and has rejected the death penalty for all children below the age of eighteen.

CONCLUSION

Amici respectfully submit that a society bounded by an injunction not to inflict cruel and inhuman punishment, as measured by evolving standards of decency, should recognize as a categorical rule of law that no person may be executed for an offense committed while under the age of eighteen years. Amici urge this Court to reverse the judgment of the Court of Criminal Appeals of the State of Oklahoma insofar as it upheld the imposition of petitioner's sentence of death.

Dated: New York, New York
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MAY 16 1987

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,

Petitioner,

—v.—

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

**BRIEF FOR AMICUS CURIAE
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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,
Petitioner,
vs.
THE STATE OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to
the Court of Criminal Appeals of the
State of Oklahoma

BRIEF FOR AMICUS CURIAE
DEFENSE FOR CHILDREN INTERNATIONAL-USA

INTEREST OF AMICUS CURIAE

This brief is submitted amicus curiae by Defense for Children International-USA (DCI-USA), with and on behalf of Defence for Children International (DCI), whose mandate is to ensure the worldwide promotion and protection of the internationally recognized principles of the United Nations Declaration of the Rights of the Child. DCI is a non-governmental organization (NGO) founded in Geneva, Switzerland in 1979 as one of the initiatives of the International Year of the Child, with individual members, affiliates and supporters in more than 57 countries, and national sections in 17 countries. DCI-USA is the United States section of the movement with local chapters in New York City, New York, New England, Pennsylvania, North Carolina and Florida. It has individual members, supporters and affiliates in more than 30 states.

DCI is in consultative status with the United Nations Economic and Social Council and with UNICEF; has served as the elected Secretariat of the Ad Hoc NGO Group on the Drafting of the Convention on the Rights of the Child since 1983; works closely with the United Nations Commission on Human Rights Open Ended Working Group on the Convention; and acts as the convenor of the NGO working party to draft the United Nations Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty.

DCI-USA is a member of the National Coalition Against the Death Penalty and of the United Nations NGO Committee on Human Rights; and acts as consultant to UNICEF on the International Rights of the Child.

ARGUMENT

I

NOT ONLY CONTEMPORARY STANDARDS IN THE UNITED STATES AS A WHOLE, BUT ALSO INTERNATIONAL NORMS AND PRACTICES OF OTHER NATIONS, SUPPORT THE CONCLUSION THAT IMPOSITION OF THE DEATH PENALTY FOR CRIMES COMMITTED BY JUVENILES CONTRAVENES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THIS NATION'S CONSTITUTION.

Amicus DCI strongly shares the view of the other amici, that, in assessing the Eighth Amendment's proscription of cruel and unusual punishment, this Court must look not only to prevailing standards, practices and attitudes within the United States, but also to those obtaining in the international community. This is the clear mandate flowing from, e.g., Weems v. U.S., 217 U.S. 349, 378 (1910); Trop v. Dulles, 356 U.S. 86, 101 (1958); Coker v. Georgia, 433 U.S. 584, 596 n. 10 (1977); Enmund v. Florida, 458 U.S. 782, 796 n. 22 (1982).

DCI also supports the thesis that, through the laws of most states of the Union,¹

¹Fourteen states plus the District of

declarations of authoritative bodies,² and the extreme paucity of actual executions of juveniles throughout its history,³ the American society as a whole has amply demonstrated its aversion to the phenomenon, leading to the conclusion that it deems it cruel and unusual punishment and thus spelling its constitutional doom under the rationale of the above cited cases.

In particular (conceding arguendo that the death penalty itself is constitutionally

Columbia have no, valid capital punishment statutes. Of the rest, eleven states directly establish the age of eighteen as the minimum age for execution (thus a majority of twenty-six jurisdictions does not allow the execution of juveniles below eighteen); three set the age at seventeen; two have it at sixteen; two at fifteen; seven at fourteen; one at thirteen; and one at twelve. There are nine jurisdictions without a minimum age for the purpose, six of which expressly provide for age as a mitigating factor in deciding the imposition of capital punishment. V. Streib, Minimum Statutory Ages for the Death Penalty (April 17, 1987) (unpublished memorandum).

²Brief of Amicus AMNESTY INTERNATIONAL, at 21-22 [hereinafter "AMNESTY brief"].

³Id. at 24-25.

permissible, to begin with), the age limit of eighteen marks the threshold that must be crossed if the imposition of capital punishment on a young person is to pass constitutional muster, even if one only takes into account the American experience. Not only is that age limit prevalent in the relevant statutes of the individual states (see supra note 1), but persons under eighteen who have been executed in the United States account for only about 2% of all executions in the history of the nation (see supra note 3). Of these, the six executed from 1960 to now all were seventeen at the time of commission of their respective crimes,⁴ which comes so close to the eighteen age limit (seventeen is the age limit, furthermore, prescribed by

⁴V. Streib, Testimony on the Death Penalty for Juveniles (offered to the Subcommittee on Criminal Justice regarding House Bill 343, 99th Cong., June 5, 1986) (mimeo). See also V. Streib, Persons Executed for Crimes Committed While Under Age Eighteen (July 15, 1986) (unpublished memorandum).

only three United States jurisdictions⁵) as to warrant the assimilation of the two.

Eighteen, moreover, is the age at which laws in the United States recognize or accord certain faculties, prerogatives and rights to young persons. According to 1980 official surveys, the age of civil majority in most states of the Union stood at eighteen (in three states at nineteen, and in three others at twenty-one).⁶ At that age persons have the right to vote in federal elections (prior to 1971, and before eighteen-year olds were granted the right to vote, the age of majority in most states was in fact twenty-one); enlist in the armed forces without parental consent (they can enlist with parental consent at seventeen); and marry without parental

⁵See supra note 1.

⁶M. Soler, et al., Legal Rights of Children in the United States of America, in 2 Law and the Status of the Child 683 (A. Mamalakis Pappas ed. 1983), and references given therein.

consent, according to the laws of most of the states.⁷ Most states also show solicitude for the young by requiring them to be either eighteen or twenty-one before they can consume alcoholic beverages.⁸ And, of course, the laws protect persons below the age of civil majority by not giving them the unfettered right to enter into contracts (if they do, their contracts are voidable at their option).⁹

These examples make a compelling case for outlawing executions of those who have not attained at least the age of eighteen at the time of the punishable offense. They, indeed, stand in sharp contrast to the specter on the other hand of state-sanctioned killing of the very same young persons, in the very same

⁷Id. at 683-684.

⁸Id. at 684-685.

⁹Id. at 713. The age of majority is eighteen according to the laws of most states. See supra text accompanying note 6.

country, for crimes committed before they have attained the level of maturity and capacity for independent and reasoned action that the civil law demands. Any semblance of rationality in penal statutes, such as the one now in question before this Court, is eclipsed in the context of the broader American landscape; and their arbitrariness, inequity and ultimate cruelty and inhumanity offend the conscience. Devoid of rationality, such laws, dealing as they do with a final and irrevocable outcome, with the deliberate unalterable destruction of human beings, and serving no legitimate goals of punishment or other substantial interests of the State,¹⁰ must not be sanctioned by this Court.

A rational uniform minimum standard need be established to govern this most

¹⁰DCI shares the views in companion briefs regarding the rehabilitation potential of young offenders, their low rate of recidivism, and the highly questionable deterrent effect of their death at the hands of the State.

fundamental issue of human rights and human dignity across the entire land. (And eighteen is the minimum age limit for which a legal foundation can be laid just from legal building blocks found within these shores, as posited above.) The grave issue of life or death should not be left to the vagaries of the uninformed opinions, local prejudices and parochial passions of the day, and to fortuitous circumstances of time and place, particularly where it concerns the young who are supposed to be the wards of society. (This issue patently is not on an equal footing with most of the matters left to the states for regulation in our federal system.) Allowing the status quo to continue would let stand the incoherent, checkered legal tableau which the Inter-American Commission of Human Rights only recently, in the case of James Terry Roach and Jay Pinkerton [hereinafter "Roach"], held "results in the arbitrary deprivation of life and inequality before the

law" and contravenes the American Declaration of the Rights and Duties of Man.¹¹

The case for fixing on age eighteen as the threshold limit, however, becomes even more compelling and overwhelming when one factors into the Eighth Amendment analysis (as one must, as noted above) the inter-State comparative and international perspectives.

The abundant evidence of national practices across the globe and norms of international law opposed to the execution of juveniles, laid out in the companion briefs and under Point II below, need not be reiterated here. Such evidence must at least be used to inform this Court's interpretation of the Eighth Amendment. And, for purposes of this concrete task of construction alone, the Court need not necessarily reach the conclusion that the norms in question are

sufficiently crystallized or legally binding on the United States (though on the basis of a fortiori reasoning the weight to be given such evidence, even just in the context of Eighth Amendment analysis, increases in proportion to its quantitative and qualitative strength, culminating in its having a conclusive bearing if it shows the existence of settled norms of international law).

DCI, however, firmly endorses the view that this Court confronts and need pass upon a second contention that it poses in tandem with other amici: that execution of youths below the age of eighteen at the time of commission of the crime is unquestionably prohibited by international law, law to which the United States is clearly subject and which this Court is competent and duty-bound to uphold and apply.

¹¹Resolution No. 3/87, Case 9647 (United States), OEA/Ser. L/V/II.69, Doc.17, p. 39, para. 61 and p. 40 (27 March 1987).

II

INTERNATIONAL LAW, INCLUDING CONVENTIONAL (TREATY) AND CUSTOMARY GLOBAL LAW, BINDING ON THE UNITED STATES PROSCRIBES IMPOSITION OF THE DEATH PENALTY ON PERSONS YOUNGER THAN EIGHTEEN AT THE TIME OF COMMISSION OF THE OFFENSE, AND THIS COURT IS DUTY-BOUND UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION TO INVALIDATE CONTRAVENING LAWS AND PRACTICES OF THE STATES OF THE UNION.

In support of this contention, DCI will avoid burdening the Court with unnecessary repetition of matter contained in companion briefs, with all of which it concurs. Instead emphasis will be placed on supplementary arguments, which should help give an exposition of the fuller dimension of this aspect.

A. The Source and Nature of International Law

Article 38(1) of the Statute of the International Court of Justice sets forth the subject-matter jurisdiction of the Court and, in effect, defines the substantive content of international law. It lists, inter alia, treaties, international custom and general

principles of law recognized by civilized nations.¹² As regards treaties, of course, the Statute embodies the old rule of pacta sunt servanda, which proclaims the binding

¹²It reads as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. ...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

force of treaty stipulations vis-a-vis States parties.¹³

The other sources of transnational law, however, are not as clear-cut. The Inter-American Commission on Human Rights in Roach (see supra note 11) listed the following elements of customary norms of international law: "(a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; (b) a continuation or repetition of the practice over a considerable period of time; (c) a conception that the practice is required by or consistent with prevailing international law; and (d) general acquiescence in the practice by other states."¹⁴

¹³This rule was codified in Article 26 of the Vienna Convention on the Law of Treaties, U.N. Doc A/CONF. 39/27 (1969), reprinted in 8 I.L.M. 679 (1969) [hereinafter "Vienna Convention"].

¹⁴Supra note 11, at 31, citing II

As this definition indicates, it has never been the view that anything approaching unanimity or even majority participation in the relevant practice of States is necessary. The quantum of practice needed would logically vary inversely according to the quantitative and qualitative weight contributed by the other constitutive elements of the custom referable to any particular norm.

The subjective element mentioned in the quoted definition, known as opinio juris, appears to be losing ground as a strict requirement when it comes to practice that patently has substantial legal content. As early as 1969, Judge Lachs of the International Court of Justice stated, in the North Sea Continental Shelf Cases, that the "general practice of States should be

International Law Commission Y.B., 1950, p. 26, para. 11.

recognized as prima faciae evidence that it is accepted as law."¹⁵

Dissenting States cannot defeat a customary rule of international law if, in spite of their dissent, a sufficient degree of generality of practice is achieved (acquiescence by some "other States" not by all other States, or the other States, is necessary). Whether a dissenting State itself can be held bound by the rule hinges on its being able to "show that it has expressly and consistently rejected the rule since the earliest days of the rule's existence."¹⁶

¹⁵Quoted in Henkin, Pugh, Schachter and Smit, *International Law, Cases and Materials* 65 (2d ed. 1980) [hereinafter "Henkin"].

¹⁶M. Akehurst, *A Modern Introduction to International Law* 32 (4th ed. 1982). The author points to the adverb "always" used by the International Court of Justice in the Anglo-Norwegian Fisheries Case, 1951 I.C.J. 116, 131. Another authority on the subject has posited that the International Court of Justice "has never yet treated [litigants'] acceptance of the practice [in question] as a sine qua non of applying the custom to them."

In addition to custom, international law, according to the International Court's Statute, encompasses general principles of law recognized by civilized nations. "Civilized" in this context naturally refers to those well governed nations extending progressive, enlightened and humane treatment to their citizens and others.

In his dissenting opinion in the South West Africa Cases, Judge Tanaka of the International Court discussed the implications of this provision of the Court's Statute vis-a-vis human rights and observed that such rights "are not the product of a particular juridical system...but the same

Waldock, General Course on Public International Law, 2 Recueil des Cours 1, 50 (1962), reprinted in Henkin, supra note 15, at 67. In the North Sea Continental Shelf Cases, the International Court of Justice stated in dictum that "general or customary law rules and obligations..., by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favor." 1969 I.C.J. 38-39.

human rights must be...protected everywhere man goes....Only one and the same law exists and this is valid through all kinds of human societies in relationships of hierarchy and coordination." Application of Article 38(1)(c), therefore, is not limited "to a strict analogical extension of certain principles of municipal law." Taking the view that human rights are grounded in natural law and are part of the jus cogens, he concluded that, by the very nature of human rights, and by the very nature and purpose of Article 38(1)(c), consent of the States is not required as a condition precedent to the formation of an international rule through the operation of this provision of the Statute. Further he opined that recognition by all the civilized States is not required, nor that the recognition take the form of an official act.¹⁷

¹⁷1966 I.C.J. 296-300. See also the separate opinion of Judge Ammoun in Barcelona

In the case of fundamental human rights, therefore, the normative process has an additional dimension. Such rights are rooted in the "conscience and reason of mankind through the ages,"¹⁸ and are sui generis when compared with the traditional transnational norms of old. They, therefore, warrant special jurisprudential accommodation. For one, human rights precepts are more readily amenable to classification, at one and the same time, as rules evolving through the practice of States on the global plane (international customary norms) and also as "general principles of law recognized by civilized nations." When this duality is there, it logically follows that less weight need be placed on the scale when weighing separate opinion of Judge Ammoun in Barcelona normative content pursuant to just one of the

Traction, infra note 19 at 302-06.

¹⁸See dissenting opinion of Judge Tanaka in the South West Africa Cases, supra note 17.

two formulas inherent in those two categories of substantive international law.

Secondly, there is a certain logical inconsistency in an insistence on strict positivist requirements of State auto-limitation with regard to the formation of basic international human rights law. The International Court of Justice has noted that obligations of States "concerning the basic rights of the human person" are obligations "towards the international community as a whole....By their very nature...[they] are the concern of all states...they are obligations erga omnes."¹⁹ It has also stated in regard to the Genocide Convention that "in such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest.... Consequently, one cannot speak

¹⁹Barcelona Traction Light and Power Co., Ltd., 1970 I.C.J. 1, 32.

of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties."²⁰

From the point of view of international law, a State indeed acts in the international arena primarily as a custodian of its national interests, and those interests may not necessarily coincide, or be compatible with, the interests of other States. In the case of fundamental human rights, however, international law is not confronted with conflicting interests of particular groups, but with the common interests of all human beings.²¹ Therefore, conceptions about

²⁰Reservations to the Convention on Genocide, 1951 I.C.J. 15, 23; See also Inter-American Court of Human Rights, Advisory Opinion OC-2/82, September 24, 1982, para. 29; European Commission on Human Rights, Application No. 788/60, 4 European Y.B. of Human Rights, 116, 140 (1961).

²¹Divergence of views regarding the best mode of observance of some human rights is to be differentiated from dissonance as to the

reciprocal exchange of commitments among States and notions that the inter-state bargain that underlies an international norm falls, if not faithfully lived up to by the parties in intrastate practice, are not quite relevant, or as relevant, to the formation of international law relating to the elemental rights of the human person.²² And when it comes to assessing practice and opinio juris of particular States in this domain, their behavior and pronouncements need be held up to exacting standards of good faith and

core content of such rights when it comes to the question of a consensual balance.

²²See Schachter, Crisis of Legitimation in the United Nations, 50 Nordisk Tidsskrift For International Ret 3, 33 (1982) and Henkin, Introduction, in The International Bill of Rights: The International Covenant on Civil and Political Rights 1,8 (L. Henkin, ed. (1984) [hereinafter "Henkin, ed."]), where the authors voice a view in a similar vein. See also Filartiga v. Pena-Irala, 630 F. 2 876, 884 n. 15 (2d Cir. 1980), where the Court stated that widespread contravention of the international customary norm prohibiting torture did not negate its legal force.

subjected to rules of strict accountability.²³

Underlying these propositions is the fact that the jurisprudential underpinnings of human rights are central to the raison d'être of law itself. And human thought, legal theory, and philosophy as of the beginnings of civilization are permeated with the concept of the inherent and inalienable rights of man--from the Hellenic Stoics and Roman philosophers to St. Thomas Aquinas, Grotius (the father of international law), Locke, Paine, Milton and Blackstone, among others, as well as the American Declaration of Independence and the French Declaration of

²³See Nuclear Test Cases, 1974 I.C.J. 457, where the International Court of Justice held France to its word (unilateral-at-large statements of intention to cease nuclear testing in the Pacific). See also Franck, Word Made Law: The Decision of the ICJ in the Nuclear Test Cases, 69 Am. J. Int'l L. 612, 619 (1975).

the Rights of Man and Citizen.²⁴ (This concept has found recognition in the United Nations Charter and Universal Declaration of Human Rights,²⁵ which take for granted the pre-existence of universal human rights.²⁶) It is these jurisprudential credentials (tradition; pre-eminence; fundamental,

²⁴See generally H. Lauterpach, An International Bill of the Rights of Man 18-64 (1945); F. Castberg, Natural Law and Human Rights: An Idea-Historical Survey, in International Protection of Human Rights: Proceedings of the 7th Nobel Symposium 13-29 (Eide and Schou eds. 1967).

²⁵G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (December 10, 1948) Preamble and Art. 1 [hereinafter "Universal Declaration"].

²⁶See supra text accompanying note 17 for Judge Tanaka's view that human rights are based on natural law. In the same opinion Judge Tanaka pointed out that "the Charter presupposes the existence of human rights and freedoms which shall be respected; the existence of such rights and freedoms is unthinkable without corresponding obligations...and a legal norm underlying them. Furthermore, there is no doubt that these obligations...also have a legal character by the very nature of the subject matter." 1966 I.C.J. 289-290. See U.N. Charter, Arts. 1(3), 55(c).

ontological and transcendent nature on all levels and planes of human society and governance; and versatility when it comes to the subject-matter jurisdiction of the International court) that ensure to human rights speedier and smoother passage across the international juridical threshold.

Furthermore, there is strong evidence that at least the more fundamental human rights are to be considered norms of jus cogens. The concept of jus cogens has been codified in the Vienna Convention.²⁷ It is apparent from the wording of the Article (supra note 27) that acceptance by all States

²⁷See Vienna Convention, supra note 13, Article 53, which reads: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

is not necessary to the establishment of a norm of jus cogens. As the text clearly shows, jus cogens norms are absolute, imperative norms that cannot be derogated from by any member of the international community. This is true even of States which might have consistently opposed them.²⁸

The Commentary of the International Law Commission to the draft articles of the Vienna Convention states that, before it was decided not to include in this article examples of some of "the most obvious and best settled rules of jus cogens," human rights norms were among the examples contemplated for listing.²⁹ In the South West African Cases,

²⁸This was acknowledged recently by the Inter-American Commission on Human Rights in Roach, supra note 11, at 33. The Commission, moreover, found that in "the OAS there is recognized a norm of jus cogens which prohibits the State execution of children." Id. at 36.

²⁹Documents of the Conference on the Law of Treaties 1968-1969, U.N. Doc. A/CONF. 39/1/Add.2, at 7 and 68 (emphasis added).

Judge Tanaka of the International Court expressed the view that human rights are part of the jus cogens (see supra text accompanying note 17); and the same Court, in Barcelona Traction, referred to obligations of States "concerning the basic rights of the human person" as "obligations erga omnes (see supra text accompany note 19). The Inter-American Commission on Human Rights in Roach posed, but did not address, the question of whether this language "is intended to mean that all codified human rights provisions contained in international treaties are embraced by the concept of jus cogens" (supra note 11, at 35-36). Certainly, however, the right to life qualifies as a "basic right of the human person," even had it not been repeatedly affirmed in international instruments.

B. Supremacy of International Law over
Laws and Practices of the
Individual States of the Union

The international agreements which forbid the execution of juveniles are clearly self-executing in view of the immediacy and the imperative tone reflected in their respective texts (and even in case of some doubt, the settled rule is that a treaty is presumed to be self-executing).³⁰ Courts in the United States are bound to apply stipulations in self-executing treaties, as well as norms of customary international law,³¹ and to invalidate contravening laws or actions of state or local governments under the Supremacy Clause, Article VI, Clause 2, of the United States Constitution.³² Ware v.

³⁰See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec. 131 (T.D. No. 6, Vol. 2, April 12, 1985).

³¹Id.

³²See also U.S. Constitution, Art. I, Sec. 8, Clause 10, which reflects recognition of federal supremacy over issues involving the "Law of Nations."

Hylton, 3 Dall. 199, 236-237 (U.S. 1796); Baker v. Carr, 369 U.S. 186, 212 (1962); The Paquete Habana, 175 U.S. 677 (1900).³³ This brief will next list the treaty and customary international law norms that are binding on the United States and which forbid the execution of youth below the age of eighteen at the time of the offense for which death is sought to be imposed.³⁴

C. Treaty Stipulations, and Other
Provisions Qualifying as
Conventional Rules, Binding on the
United States, by Reason of Which
Execution for Crimes of Juveniles
Under Eighteen is Prohibited.

The arguments under this rubric are to be distinguished from the argument that the

³³See also Oyama v. California, 332 U.S. 633, 649-650 (1948); First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 622-623 (1923); Filartiga v. Pena-Irala, 630 F.2d 876, 880-890 (2d Cir. 1980); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1385-1390 (10th Cir. 1981).

³⁴"For purposes...of liability to capital punishment, the age of the offender is universally determined as that of the date of the commission of the crime, not of the date

United States is bound under customary international law, as codified in Article 18 of the Vienna Convention (see supra note 13), to refrain from acts which would defeat the object and purpose of treaties prohibiting the execution of juveniles that it has signed but not yet ratified. This valid argument has received full treatment in the companion briefs and need not be reiterated.

Instead, emphasis will be placed on provisions fully binding on the United States as conventional rules (not just on an interim basis or as a stopgap measure, albeit of indefinite duration). The most obvious examples of these by now are the Charter of the Organization of American States³⁵ as amended by the 1967 Protocol of Buenos

of the trial or punishment." U.N. Department of Economic and Social Affairs, Capital Punishment: Developments 1961-1965, U.N. Doc. ST/SOA/SD/10, at p. 14, para. 45 (1967).

³⁵₂ U.S.T. 2394, T.I.A.S. No. 2361 (entered into force December 13, 1951).

Aires,³⁶ on the basis of which, through subsequent acceptance (as affirmed in Roach, supra note 11, at 30), the American Declaration of the Rights and Duties of Man³⁷ became binding; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Article 68).³⁸

The American Declaration of the Rights and Duties of Man provides in relevant parts that "[e]very human being has the right to life, liberty and the security of his person" (Article I); that all have the right to equality before the law (Article II); that "all children have the right to special protection, care and aid" (Article VII); and

³⁶T.I.A.S. No. 6847, O.A.S.T.S. No. 1-A, O.A.S.O.R., O.E.A./Ser. A/2, Add. 2 (entered into force February 27, 1970).

³⁷O.A.S. Res. XXX, 1948, O.A.S.O.R. O.E.A./Ser. L/V/1.4, Rev. (1965).

³⁸₆ U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

proscribes "cruel, infamous or unusual punishment" (Article XXVI). In Roach (supra note 11, at 40), the Inter-American Commission on Human Rights found that the execution of the juveniles Roach and Pinkerton for crimes committed while under the age of eighteen violated Articles I (right to life) and II (right to equality before the law) of the American Declaration. The Commission held that in "the OAS there is a...norm of jus cogens which prohibits the State execution of children" (supra note 11, at 36).

As for the Geneva Convention, which explicitly prohibits the execution of juveniles under the age of eighteen at the time of the offense (supra note 38, Article 68), and which is ratified by 162 States, including the United States, it should not be denied that it establishes a treaty rule binding in peace time as well, in view of the fact that it is indeed during times of war or

national emergency only when treaties and general international law allow derogation, if at all (the prohibition against execution of juveniles is non-derogable), from human rights norms.

Over and above these instruments, however, the United States is bound by the Charter of the United Nations, which proclaims "the dignity and worth of the human person" (Preamble); establishes the "promot[ion]" of "universal respect for, and observance of, human rights" as one of its purposes (Articles 1, 55(c); and "pledge[s]" all Member States "to take joint and separate action in cooperation with the organization for the achievement" of this and its other purposes (Articles 55(c), 56). It is now settled that, by virtue of these provisions, the Charter imposes legal obligations on Member States to severally and jointly

respect and promote human rights.³⁹ Surely, promotion of human rights means pushing forward and expanding the protection of the human person, not going back or reneging on norms already established. The United States, therefore, will not be faithful to its legal pledge to promote human rights⁴⁰ if a repudiation of its commitment under the Geneva Convention of 1949, through acquiescence to the enforcement of statutes

³⁹See Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 57; Montreal Statement of the Assembly for Human Rights of March 27, 1968, reprinted in 9(1) J. Int'l. Comm'n of Jurists 94; Schwelb, The International Court of Justice and the Human Rights Clauses of the Charter, 66 Am. J. Int'l L. 337, 341-350 (1972); Sohn, The Human Rights Law of the Charter, 12 Tex. Int'l L.J. 129, 131 (1977).

⁴⁰See generally, Schachter, The Charter and the Constitution: The Human Rights Provisions in American Law, 4 Vand. L. Rev. 643 (1951).

such as the one now before this Court, is allowed to stand.⁴¹

It is in pursuance of the Charter's mandate on human rights, moreover, that the United Nations has elaborated the many human rights instruments currently in existence.⁴² Foremost is the Universal Declaration of Human Rights (supra note 25) (that the United States took the lead in elaborating, voted for, and has invoked against other nations), which is now looked upon as the ius constituendum of the Charter⁴³ with regard to

⁴¹As the Inter-American Commission on Human Rights has observed, "human rights...always represent progress with respect to the preservation of human dignity and never a regression to situations that were regarded as having been overcome." IACHR, Annual Report, 1982-1983, OEA/Ser. L/V/II/61 Doc. 22, Rev. 1, at 159 (1983).

⁴²See UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/1/Rev. 1 (1978). Their preambles invariably make reference to the Charter.

⁴³The wording of its Preamble makes its direct link to the Charter abundantly clear.

the term "human rights" and as part of international law.⁴⁴ The Declaration affirms the "inherent dignity and worth of the human person" (Preamble, Article 1); the right of everyone to "life, liberty and security of person," set out in unqualified terms (Article 3); the right to freedom from "torture or cruel, inhuman or degrading treatment or punishment" (Article 5); the

⁴⁴That is the position taken with regard to at least the civil rights enunciated in the Declaration. It is based on the provisions of Article 38 of the Statute of the International Court of Justice (supra note 12). It is supported by either one, or both, of the following propositions: (1) most, if not all, of the principles enshrined in the Declaration are "general principles of law recognized by civilized nations"; and (2) by subsequent "general practice accepted as law," not only has a customary rule of international law emerged whereby the Declaration has become accepted as an authoritative interpretation of the Charter provisions on human rights, and is as such binding on all member States of the United Nations (see supra note 39 and accompanying text), but moreover by reason of "general practice," the Declaration has also become part of general customary international law independent of the Charter, and thus binding on all Member States alike. See e.g.,

right to equality before the law and equal protection of the law (Article 7); and that "childhood [is] entitled to special care" (Article 25(1)).

These are provisions comparable to those of the American Declaration on the basis of

Humphrey The Universal Declaration of Human Rights: Its History, Impact and Juridical Character, in Human Rights: Thirty Years After The Universal Declaration, 27-37 (B.G. Ramcharan ed. 1979). In the Declaration of Teheran, the official International Conference on Human Rights (April-May 1968) also set forth the conclusion that the Universal Declaration "constitutes an obligation for the members of the international community." U.N. Doc. A/CONF. 32/41, at 4. In December of 1968, the General Assembly endorsed the Declaration of Teheran. G.A. Res. 2442 (XXII), 23 U.N. GAOR, Supp. No. 18, U.N. Doc. A/7218, at 49. See also the separate opinion of Judge Ammoun in Barcelona Traction, supra note 17; and the article by Judge Lachs, The Law in and of the United Nations, 1 Ind. J. of Int'l L. 1960-61, at 429, 437-442. This view is shared even by the positivist Russian school of international law. See Tunkin, The Legal Nature of the United Nations, 3 Recueil des Cours 7, 32-37 (1966). The same view was expressed officially by then United States Secretary of State Henry Kissinger. See E. McDowell, Digest of United States Practice in International Law 1976, at 138 (Dept. of State Publication, 1977).

which the Inter-American Commission on Human Rights held adversely to the United States after finding that, by subsequent acceptance, that Declaration had acquired the binding force of conventional law (see supra, text following note 38 and text accompanying notes 35-37). By the same token, the Universal Declaration has, by subsequent acceptance, become an obligatory instrument. Therefore, by the same reasoning, its own affirmation of the right to life and equality before the law, coupled with the other provisions singled out above, operates, through the mandate of the Charter, to impose an obligation on the United States not to execute juvenile offenders.

Moreover, all the provisions of the Universal Declaration have by now been incorporated into several binding international (as well as regional) agreements, in addition to solemn declarations, by the General Assembly and other organs. These concretize, amplify and elaborate the norms set forth in

broader terms in the Universal Declaration and consistently make specific reference to the latter in their preambles.⁴⁵ The International Covenant on Civil and Political Rights, adopted unanimously by the General Assembly in 1966,⁴⁶ is one of those instruments. Its Preamble clearly links it to the Charter and the Universal Declaration and affirms "recognition of the inherent dignity" of all persons (see also Article 10). Its Article 6(5), which forbids execution of

⁴⁵This aspect is factored into the equation which makes for the conclusion that, through international practice, the Declaration is recognized as laying down binding norms. Additionally, the Declaration has not only been invoked against States, but been cited and recited in a plethora of important resolutions of the General Assembly of the United Nations, often in mandatory terms and on an equal footing with the Charter. See e.g., G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. No. 16 at 66, U.N. Doc. A/4684 (1960); G.A. Res. 1904 (XVIII), 18 U.N. GAOR, Supp. No. 16, at 35, U.N. Doc. A/5515 (1963).

⁴⁶G.A. Res. 2200 (XIX), 21 U.N. GAOR, Supp. No. 16, at 52-58, U.N. Doc. A/6316 (1966) [hereinafter "Covenant"].

youth under eighteen at the time of the offense, opens with an affirmation of "the inherent right to life," calls for restriction of the death penalty, and contains an indirect appeal for its total abolition.⁴⁷ It is apparent, therefore, that the limitations the Covenant places on executions represent the maximum concessions to retentionist States. (It need not be pointed out to this Court that limitations on rights affirmed in sweeping and emphatic terms in instruments of constitutional import are to be strictly construed.) Thus, the age limit of eighteen is to be looked upon as the absolute minimum that the Covenant countenances. This is also borne out by the

⁴⁷The Human Rights Committee established under the Covenant to monitor its implementation has stated that the "article also refers generally to abolition in terms which strongly suggest that abolition is desirable." U.N. Doc. A/37/40, pp. 93-94, para. 6 (1982). In fact, the United Nations Commission on Human Rights is currently at work on a protocol to the Covenant for the abolition of the death penalty.

travaux preparatoires, as shall be also noted below.

In view of the link between the Covenant and the Universal Declaration, Article 6(5) of the former is a reliable guide to inform the interpretation of the "right to life" provision in the latter.⁴⁸ The Covenant provision can, also, according to the Vienna Convention (see supra note 13, Article 31(3)), be used to authoritatively interpret the Universal Declaration by being viewed as a "subsequent agreement between the parties," a "subsequent practice in the application" of the Declaration, and/or as "relevant rules of international law."

The Covenant (like the Universal Declaration) also proscribes "cruel, inhuman

⁴⁸In the Namibia opinion, the International Court of Justice stressed that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation." See supra note 39, at 31.

or degrading treatment or punishment" (Article 7) and affirms the right to equality before the law and equal protection of the law (Article 26). It, moreover, also specifies that the "penitentiary system shall comprise treatment...the essential aim of which shall be...reformation and social rehabilitation," with juvenile offenders "segregated from adults and...accorded treatment appropriate to their age and legal status" (Article 10(3)); that in the case of juveniles "the [penal] procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation" (Article 14(4)); and that "[e]very child shall have...the right to such measures of protection as required by his status as a minor, on the part of...the State" (Article 24(1)). Thus, the two instruments display a unity of design and purpose, which entitles the latter of the two to be viewed as an interpretational extension of the first. Since the Universal Declaration is binding on

all Member States as the authoritative interpretation of their obligations under the Charter relative to human rights,⁴⁹ by process of legitimate teleological interpretation, Article 6(5) is likewise binding on the Member States, regardless of whether or not it is declarative of customary international law or whether or not it has, since its adoption, acquired the status of an international customary rule.

This is not an attenuated way of imposing norms on States, inasmuch as both Article 6(5) and 7 of the Covenant (the most relevant here) allow of no derogation (even in emergency). This signifies that the norms they embody lie at the core of the human rights mandate of the Charter; that they necessarily and properly flow from the Charter's matrix of international human rights law. (It is not suggested that the thesis posited above would

⁴⁹ See supra notes 43-44 and accompanying text.

apply to rights which do not fit this description.)

It might be argued that since the United States upon ratification of the Covenant can make a reservation to Article 6(5), it cannot be held bound by it as a conventional rule.⁵⁰ But as the Covenant makes no provision for reservations, the matter is governed by general rules of international law regulating the admissibility and legal effect of reservations.⁵¹ Accordingly, such a reservation would not be acceptable in view of its obvious incompatibility with the object and purpose of the treaty (Vienna Convention,

⁵⁰A reservation would be of no import if the Article is declaratory of customary law unless the reserving State has been a consistent ab initio objector. See supra note 16 and accompanying text.

⁵¹Principles enunciated in the Advisory Opinion on Reservations to the Convention on Genocide, 1951 I.C.J. 15 and codified in Articles 19-21 et seq. of the Vienna Convention (see supra notes 13, 20).

Article 19).⁵² The fact that the existing laws and practices of individual states of the United States do not happen to conform to the norm under discussion is to no avail. It is well settled that a nation may not plead its domestic laws as justification for failure to abide by a treaty, any more than for failure to observe rules of customary international law.⁵³

⁵²Id. See also Inter-American Court of Human Rights, Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC - 3/83, September 8, 1983, para. 61: "a reservation...designed to enable a State to suspend any of the non-derogable...rights must be deemed to be incompatible with the purpose and object of the Convention and, consequently not permitted by it". According to information supplied by the United Nations Office of Legal Affairs, no reservations, indeed, to Article 6(5) have been entered by any State.

⁵³See Schachter, "The Obligation to Implement the Covenant in Domestic Law," in Henkin, ed., supra note 22, at 311, 322.

D. The United States Is also Bound by International Customary Law, and International Law Deriving from Principles of Law Recognized by Civilized Nations, that Forbid Execution of Youth for Culpable Conduct While Under Eighteen

Besides the direct legal obligation imposed on it by the aforesaid conventional rules, the United States is bound by other (or the same but differently classified) rules of international law that regulate the issue (and this is so irrespective of whether it is also bound by any treaty qua treaty). In considering this aspect, the provisions in treaties and other international and regional instruments are again relevant, albeit from a different standpoint. Also relevant are the inter-State practices of States, as well as their internal laws and practices.

In addition to the stipulations in the Geneva Convention, the Universal Declaration, the American Declaration and the Covenant (see supra text accompanying notes 38-49), there are: a) The American Convention on Human

Rights (Article 4)⁵⁴; Protocol II to the 1949 Geneva Conventions and Relating to the Protection of Victims of Non-international Armed Conflicts (Article 6(4)),⁵⁵ both of which have been signed by the United States and explicitly prohibit the execution of youths committing crimes when under eighteen; b) Protocol No. 6 to the European Convention on Human Rights⁵⁶ which abolishes capital punishment altogether; c) Draft Convention on the Rights of the Child, adopted by the

⁵⁴OASOR OEA/Ser. K/XVI/I.1, Doc. 65, Rev. 1, Corr. 2 (November 22, 1969) [hereinafter "American Convention"]. Its preamble links it to the Universal Declaration and it contains in Articles 5, 19 and 24 essentially the same provisions as the Covenant catalogued supra in text accompanying notes 46-47 and preceding note 49.

⁵⁵Submitted to the Senate on December 13, 1986 for ratification. Message from the President, 100 Cong., Treaty Doc. 100-2, 1987.

⁵⁶Opened for signature April 23, 1983, 1983 Europ. T.S. No. 114.

Working Group on the Convention of the United Nations Commission on Human Rights, which prohibits capital punishment or life imprisonment for crimes committed by those under eighteen, as well as cruel, inhuman or degrading treatment (draft article 19(2)(a-b)).⁵⁷

Additionally, there is the United Nations Declaration of the Rights of the Child, unanimously adopted by the General Assembly.⁵⁸ Its preamble expressly relates it both to the United Nations Charter and the Universal Declaration; underscores that the child needs "special safeguards" and "legal protection"; and expressly reminds that the need for such special safeguards had been already affirmed in the Universal

⁵⁷See U.N. Doc. E/CN.4/1986/39, Appendix.

⁵⁸G.A. Res. 1386 (XIV), U.N. Doc. 4354, at 19 (November 20, 1959).

Declaration,⁵⁹ in the prior Geneva Declaration of the Rights of the Child of 1924⁶⁰ and in other instruments of global reach.⁶¹ The preamble, moreover, reiterates the principle enunciated in its progenitor⁶² that "mankind owes to the child the best it has to give." Among its ten operative principles, the Declaration states that the child "shall enjoy special protection"

⁵⁹Article 25 (1). See supra text following note 44.

⁶⁰The 1924 Declaration was adopted by the Assembly of the League of Nations and was based on the Charter of the International Union for Child Welfare. It was minimally revised in 1946 by the latter's General Council. It proclaimed, inter alia, that the "child must be protected" (Article 1 of the 1946 revision) and that "the maladjusted [child] must be re-educated (Articles 2 and 4, respectively, of the original and revised versions).

⁶¹See also the provisions of special relevance to children in the subsequently enacted Covenant, supra text accompanying notes 46-49.

⁶²Geneva Declaration of 1924, supra note 60 and accompanying text.

(Principle 2); and that the child "shall be protected against all forms of...cruelty" (Principle 9).

All United Nations sponsored human rights instruments are expressly linked to the Charter and the Universal Declaration of Human Rights.⁶³ Thus anyone of these cannot be viewed in isolation. Its juridical impact transcends its own structure. It is part of a larger organic whole, part of a constellation with unity of substance and purpose, meant to move along in unison on the international plateau of law. It has legal value beyond its own individual status as a treaty or a declaration. There is a reciprocity of influence among all of them; they feed upon

⁶³The draft preamble of the proposed Convention on the Right of the Child also refers to the Charter and the Universal Declaration as well as the Declarations of the Rights of the Child of 1959 and 1924. See supra note 57. The regional conventions likewise make reference to the Universal Declaration in their preambles.

each other and converge to produce a cumulative legal effect; and each must be viewed concordantly with the vision that inheres in the scheme to which it belongs.

The repeated affirmations in these instruments regarding the rights of children (right to special protection; right to freedom from "all forms of cruelty" and degrading treatment; right to equal protection of the laws; right to rehabilitation; and, of course, exemption from capital punishment), coupled with the evidence presented by Amicus Amnesty International of formalized and customary refusal by the great majority of nations to impose death on persons under eighteen at the time of culpable conduct,⁶⁴ clearly establish that the inadmissibility of such punishment is a principle of law recognized by civilized nations within the meaning of Article 38 of

⁶⁴AMNESTY brief, at 18-19, 22-25.

the Statute of the International Court of Justice. This is then an international legal norm binding on all members of the international community, regardless of whether or not they consent to it (even if the dissenters themselves generally qualify as civilized nations).⁶⁵

Additionally, the norm qualifies at one and the same time as a customary norm of international law. Because of its dual character in that respect (its eligibility under more than one test of normative maturation), it would have passed the juridical threshold on the strength of its combined credentials, even if each set of them by itself was of marginal merit.⁶⁶ Marginality, however, is by no means the case here, and there is no need to press this ex abundanti cautela argument. This is

⁶⁵See supra note 44 and text accompanying note 17 for the opinion of Judge Tanaka of the International Court.

reinforced when one examines the norm also from the perspective of international customary law, baring in mind that the evidence adduced along this route is equally germane simultaneously in polishing the norm's twin legal armor as a "principle of law recognized by civilized nations."

First, there is solid evidence that the norm belongs to the jus cogens genre. Every instrument which incorporates it admits of no derogation from it.⁶⁷ Thus it falls squarely

⁶⁶See generally supra text accompanying notes 18-26.

⁶⁷See Covenant, supra note 46, Art. 4(2). See also American Convention, supra note 54, Art. 27(2). Even the prohibition of the Covenant against not only cruel, but degrading, punishment or treatment is not derogable (see id), which illustrates by comparison the supreme importance of the norm against execution of juveniles. The American Convention (see id) additionally makes non-derogable not only the prohibition of cruel or degrading punishment or treatment (Article 5(2), but also "the right" of the child to such measures of protection as are required by his status as a minor (Article 24). See also Arts. 3-4 of Protocol No. 6 to the European Convention (see supra text accompanying note 56).

within the definition of the Vienna Convention (see supra note 27), not to mention the various authoritative references to basic human rights norms as being jus cogens.⁶⁸ The United Nations Commission on Human Rights has, indeed, accepted the thesis that this and other non-derogable norms are inalienable and peremptory within the meaning of the Vienna Convention.⁶⁹ By definition, of course, a jus cogens norm is binding on one and all, even dissenters (see supra note 27 and accompanying text). In view of the above, any further inquiry can be deemed foreclosed; there is no need to survey practices of States nor to examine the attitude of the United States with regard to any aspect of the matter.

⁶⁸See supra text accompanying and following note 29.

⁶⁹See U.N. Doc. E/CN. 4/Sub. 2/1982/15, pp. 18-19, para. 67 et seq.

Assuming arguendo that the norm does not qualify as jus cogens, or even as a principle of law recognized by civilized nations, which is by no means conceded, its mere candidacy for these mantles adds a lot of extra weight to the proposition that it qualifies as a norm of customary international law. Even if one discounts the thesis that human rights norms more readily pass into the juridical mainstream (see supra text accompanying notes 18 to 26), the evidence is overwhelming that this particular norm has done so. A few of the applicable considerations merit emphasis.

A stipulation in a treaty is binding on non-parties if it is declaratory of a pre-existing norm of customary law or if it subsequently acquires the status of a customary rule (Vienna Convention, supra note 13, Article 38). The rule under discussion had been universally accepted in the Geneva Convention (supra note 38) for seventeen

years prior to the adoption of the Covenant (see supra text accompanying notes 46-49) (and had even pre-dated the Convention⁷⁰). The drafters of the Covenant took it as a given that execution of juveniles was a proscribed thing.⁷¹ The proscription was thus already a customary rule.

⁷⁰See III Final Record of the Diplomatic Conference of Geneva of 1949, Annexes, p. 131, Art. 59; International Committee of the Red Cross, Commentary, IV Geneva Convention, p. 347.

⁷¹The Working Group of the Committee of the General Assembly working on the Covenant (Third Committee), after considering a proposal that would exclude from the death penalty "children and young persons" (Japan), recommended to the Committee that it choose from among the following words: "minors," "juveniles," and "persons below eighteen." The Committee opted for the last as being the most succinct. Report of the Third Committee U.N. Doc. A/3764 (1957), 12 GAOR, Annexes, Agenda It. 33, pp. 10-11, paras. 93, 105. Prior to the vote the U.K. representative objected to the term "minors" as it "specifically meant persons under twenty-one." 12 GAOR, C.3/SR. 820, para. 3 (25 Nov. 1957). Other reasons for the choice made were that it was in harmony with the practices of most countries; was the prescription used in the Geneva Convention of 1949; and would impose an equal obligation on all States. Id.

The Covenant thereafter became widely ratified by nations representing all regions and legal systems (eighty six nations so far and increasing each year), all unreservedly acceding to its Article 6(5) (see supra note 52).⁷² "[A] very widespread and representative participation in the convention [can] suffice of itself" to transform a treaty stipulation (a purely conventional rule) into a rule of customary law, "even without the passage of a considerable length of time." North Sea Continental Shelf Cases, 1969 I.C.J. 42. (The treaty by itself, under the circumstances provides the requisite elements

para. 21; id. SR. 812, para. 25; id. SR. 813, para. 32; id. SR. 817, para. 33; id. SR. 819, para. 10. Thus the age of eighteen was seen as the minimum cutoff point.

⁷²The delay by some States in ratifying the Covenant can be attributed to such factors as its burdensome reporting procedures, which no doubt some States are not too anxious to undertake.

of State practice and opinio juris, without the need to examine other items⁷³). A fortiori we are facing a customary rule of international law when, as here, the rule has been codified for twenty-one years (counting as of the adoption of the Covenant alone); was recognized as a customary rule beforehand; was reaffirmed in other normative instruments thereafter, including the American Convention (see supra note 54) and such as the Resolution by the General Assembly of 1980 endorsing the view that Article 6 of the Covenant constitutes "a minimum standard" for all Member States (not just ratifying States)⁷⁴;

⁷³See generally Baxter, Multilateral Treaties as Evidence of Customary International Law, XLI Brit. Y.B. Int'l L. 275 (1965-1966).

⁷⁴G.A. Res. 35/172, 35 U.N. GAOR, Supp. No. 48, U.N. Doc. A/35/48, at 195 (1980). Like a treaty, a resolution of the General Assembly can be viewed as a constitutive element of State practice or as evidence of State practice, or both, as well as a vehicle for expressing opinio juris. Important,

and is amply reflected in intrastate practice.

Even as an ordinary rule of customary international law (even if not jus cogens or a rule deriving from "principles of law recognized by civilized nations") the norm embodied in Article 6(5) of the Covenant is binding on the United States, being that this country does not qualify as an ab initio consistent objector, as the evidence presented in this and in companion briefs conclusively shows (the long-standing full adherence of the United States to the Geneva Convention of 1949 alone should be determinative here).⁷⁵ An important consideration in this connection is the fact

broadly supported resolutions can, moreover, be viewed as a source of international law, additional to treaty and custom. See the Namibia opinion supra note 39, at 50-57; Western Sahara Case, 1975 I.C.J. 12; separate opinion of Judge Ammoun in Barcelona Traction, supra note 17.

⁷⁵See AMNESTY brief, n. 13 and text following n. 22.

that any expressed reservations on the part of United States officials with regard to provisions such as Article 6(5) of the Covenant have been voiced in terms of the inconvenience and delicate internal jurisdictional considerations that such stipulations would entail by reason of the inconsistency between them and current laws in the United States. This is not a substantive reservation; not an objection in principle.⁷⁶ Moreover, United States diplomatic representatives have seen fit not to dissent against, and even support, United Nations resolutions re-affirming the norm

⁷⁶ See supra text accompanying note 53 regarding the import of pleading domestic law as against international standards. The purpose of international human rights law is to uplift national standards and not to emulate the least common denominator.

(such as the resolutions on Article 6(5) of the Covenant and "The Beijing Rules").⁷⁷

Thus the prohibition contained in Article 6(5) of the Covenant and other international instruments is part of the federal common law and ipso jure supercedes contravening state legislation. It should, in different words, conclusively inform this Court's interpretation of relevant provisions of this nation's Constitution (particularly as, even in its absence, such interpretation cries for the same result). Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 1, 43 (1804); Weinberger v. Rossi, 456 U.S. 25, 33 (1982).⁷⁸

⁷⁷ See supra note 74 and accompanying text; AMNESTY brief n. 18, and text following n. 26 up to "CONCLUSION."

⁷⁸ See also, Schachter, supra note 53, at 315.

CONCLUSION

For the reasons above stated, Amicus DCI prays that this Court spare the life of the petitioner; and strike down laws such as the Oklahoma Statute under review, which allow such unconscionable cruelty to be perpetrated on a person of young age. Surely, in this day and age, the execution of William Wayne Thompson, and others like him, is not "the best that mankind has to give" our children. It would be the ultimate betrayal of a sacred trust of civilization.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM WAYNE THOMPSON
Petitioner,
v.
STATE OF OKLAHOMA
Respondent.

On Writ Of Certiorari To The
Oklahoma Court Of Criminal Appeals

BRIEF OF AMICI CURIAE FOR RESPONDENT OKLAHOMA
BY KENTUCKY AND ALABAMA, ARIZONA, CONNECTICUT,
DELAWARE, FLORIDA, IDAHO, KANSAS, MISSISSIPPI,
MISSOURI, MONTANA, NEVADA, NEW MEXICO, NORTH
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INTERESTS OF AMICI CURIAE
IN SUPPORT OF THE RESPONDENT,
STATE OF OKLAHOMA

The amici curiae represented here are states having an interest in the issue of whether or not the Eighth Amendment limits punishment on the basis of age. The amici submit this brief in support of the respondent, State of Oklahoma, through their Attorneys General or Chief State Attorneys pursuant to United States Supreme Court Rule 36.4.

SUMMARY OF ARGUMENT

The per se rule urged by the petitioner is arbitrary and he does not cite any state or federal court decision expressly accepting his position. Eligibility for capital punishment should continue to be determined on an individualized, case-by-case basis. The states must be allowed to punish capital offenders consistently, according to the defendants' relative degree of culpability rather than simply by their birthdate. Maturity and sophistication are factors which vary from

individual to individual, and sentencers should be afforded an opportunity to consider these differences in determining the appropriate punishment for the crime. This Court has recognized that the determination of whether, and under what circumstances, a particular criminal penalty may be imposed is a matter of legislative policy deserving of judicial deference. The petitioner's "bright-line" approach would only result in inconsistency by ignoring individual differences, and therefore is wholly unreasonable. The rule he urges would also establish precedent for exempting other age groups undeservedly, even in non-capital contexts.

ARGUMENT

THE EIGHTH AMENDMENT DOES NOT PROHIBIT CAPITAL PUNISHMENT ON THE BASIS OF CHRONOLOGICAL AGE ALONE.

- A. Eligibility For Capital Punishment Should Continue To Be Determined On An Individualized, Case-By-Case Basis.

The Oklahoma Court of Criminal Appeals correctly held that the Eighth Amendment does not

prohibit capital punishment on the basis of age alone. Thompson v. State, Okl. Crim. App., 724 P.2d 780 (1986). A capital offender's chronological age is but one of the various circumstances the legislatures and courts should take into account. It is not the only relevant consideration, nor is it always the most important. Maturity and sophistication are factors which vary from individual to individual.^{1/} This is true of juveniles and adults alike.

^{1/}. "Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully 'street wise', hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the Court indicated in In re Gault, 387 U.S. 1 (1967), the facts relevant to the care to be exercised in a particular case vary widely. They include the minor's age, actual maturity, family environment, education, emotional and mental stability, and, of course, any prior record he might have." Fare v. Michael C., 442 U.S. 707, 734, n.4 (1979) (Powell, J., dissenting).

Guided, individualized consideration of the offender's character and the circumstances of his crime is the touchstone of capital sentencing. See Zant v. Stephens, 462 U.S. 862, 879 (1983), collecting cases. Gregg v. Georgia, 428 U.S. 153 (1976) and its progeny are intended to avoid the kind of "rigid", "mechanical" and "wholly arbitrary" determination urged here by the petitioner. Barclay v. Florida, 463 U.S. 939, 950 (1983). No particular circumstance of a capital offender's crime should automatically require the death penalty, Woodson v. North Carolina, 428 U.S. 280 (1976), or automatically foreclose it, Tison v. Arizona, ___ U.S. ___, 107 S.Ct. 1676 (1987). Rather, the sentencer must be "free to consider a myriad of factors to determine whether death is the appropriate punishment." California v. Ramos, 463 U.S. 992, 1008 (1983). Youthfulness is only one such factor.

B. The Case-By-Case Rule Urged Here Is Supported Overwhelmingly By State and Federal Court Decisions Expressly Dealing With The Issue. It Also Gives Appropriate Deference To The Legislature.

The petitioner cites to no state or federal court decision agreeing with his contention that the judiciary, rather than the legislature, should set an age limit for eligibility as a capital offender. To the contrary, it appears that every reported opinion deciding this issue has deferred to the legislature. The Fifth and Eleventh Circuits have expressly held that executing a killer who at the time of his crime was under eighteen years of age is not cruel and unusual punishment per se. "Nothing in society's standards of decency compel more than consideration of an eighteen^{2/} year old's youth as a mitigating factor." High v. Kemp, 819 F.2d 988, 993 (11th

^{2/}. High and Prejean were seventeen-years-old when they committed these crimes.

Cir. 1987), quoting Prejean v. Blackburn, 743 F.2d 1091, 1098 (5th Cir. 1984). See also Roach v. Martin, 757 F.2d 1463, 1483 (4th Cir. 1985), holding that the death sentence for a seventeen-year-old offender was not disproportionate in view of all the circumstances.

A growing number of state courts likewise have expressly held that the Eighth Amendment does not exempt youthful offenders from capital punishment. See, e.g., Ice v. Commonwealth, Ky., 667 S.W.2d 671 (1984) (fifteen-year-old offender); Trimble v. State, Md., 478 A.2d 1143 (1984) (seventeen-year-old offender); State v. Battle, Mo., 661 S.W.2d 487 (1983) (eighteen-year-old offender); Tokman v. State, Miss., 435 So.2d 664 (1983) (seventeen-year-old offender); Eddings v. State, Okla. Crim. App., 616 P.2d 1159 (1980) reversed other ground 455 U.S. 104 (1982) (sixteen-year-old offender); State v. Harris, 48 Ohio St.2d 351, 359 N.E.2d 67 (1976), vacated other ground 438 U.S. 351 (1978)

(seventeen-year-old offender); Maqill v. State, Fla., 428 So.2d 649, 554 (1983) (Boyd, J., concurring and dissenting), appeal after remand, 457 So.2d 1367 (1984), vacated other grounds, Maqill v. Dugger, ___F.2d___, No. 85-3820, Slip Opinion (decided July 28, 1987) (seventeen-year-old offender); State v. Valencia, 132 Ariz. 248, 645 P.2d 239, 241 (1982) (sixteen-year-old offender); Thompson v. State, Ind., 492 N.E.2d 264, 269 (1986) (seventeen-year-old offender).

The foregoing state and federal rulings are firmly supported by prior decisions of this Court defining the judiciary's "limited role" in analyzing an Eighth Amendment claim. Gregg v. Georgia, supra at 175.

The deference we owe to the decisions of the state legislature under our federal system [citation omitted] is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy." [citations omitted]. Id. at 177.

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people. Id. at 176.

C. Most Death Penalty States Permit Capital Punishment Of Youthful Offenders.

The briefs on behalf of the petitioner try hard to set Oklahoma apart from other states in its treatment of chronological youthful offenders charged with capital crimes.^{3/}

^{3/}. "The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." Tennessee v. Garner, 471 U.S. 1, 28 (1984) (O'Connor, J., dissenting); Spaziano v. Florida, 468 U.S. 447, 464 (1984).

Actually, of the thirty-six death penalty states^{4/}, Oklahoma is among the twenty-five which authorize capital punishment for youthful offenders.^{5/} Thus, Oklahoma belongs to a seventy percent majority of death penalty jurisdictions which look beyond the offender's birthdate in determining the appropriate form of punishment to be imposed for a capital crime. More than a third of this number set no statutory

^{4/}. Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Illinois, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. (Petitioner's Appendix B).

^{5/}. Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, and Wyoming. Id.

age limit whatsoever.^{6/} The petitioner's Appendix D shows that thirty-six offenders under the age of eighteen years were sentenced to death in sixteen different states between 1982 and 1987. Sentencers in all states, however, are required to consider the offender's chronological age and a variety of other mitigating factors in a capital prosecution. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, supra; Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669 (1986).

D. The Petitioner's Statistics Do Not Support His Position.

The petitioner further contends that judges and juries are increasingly reluctant to execute youthful offenders. He arrives at this conclusion by comparing the number of juvenile death sentences with the number of juvenile

^{6/}. Arizona, Delaware, Florida, Oklahoma, Pennsylvania, South Carolina, South Dakota, Washington, and Wyoming. Id.

arrests for non-negligent homicide. (Petitioner's Appendix G). His statistics do not reflect how many of these arrests were for aggravated murders punishable by death, or how many of the arrestees avoided prosecution as adult offenders, or how many of them successfully plea-bargained for a lesser degree of homicide, or how many of them otherwise avoided prosecution altogether, or how many of them never faced death as a possible punishment because they were either arrested in a non-death penalty state or tried without the prosecutor requesting death as a possible punishment. Owing to these omissions, the petitioner's statistical conclusions are completely unreliable. His Appendix C, in fact, shows that the total number of executions conducted during the 1980's included a higher percentage of juvenile offenders than any other period during this century. If there is a

trend, it is towards execution^{7/} of youthful offenders, not away from this.^{8/}

7/. Logically, the death penalty has a greater deterrent effect than does life imprisonment. Statistically, the death penalty has a profound effect on the number of murders committed in this country. Capital Punishment: An Idea Whose Time Has Come Again, The Lincoln Institute For Research And Education (Washington, D.C. 1986), p.12. The petitioner's contention that the death penalty would provide an incentive for "death-defying" youths to commit capital crimes is an exercise in circular reasoning.

8/. The petitioner and his supporters argue in this Court that capital punishment of youthful offenders is a relic of a bygone era. It is interesting to note that elsewhere, opponents of capital punishment have expressed a fear that precisely the opposite is true: "That more minors will be sentenced to death also is indicated by the growing willingness, at least on the part of some, to impose this sentence on minors. More and more states are amending their death penalty statutes to permit the imposition of death sentences on offenders under age eighteen. That [38] juvenile offenders are currently on death row certainly demonstrates that sentencers are willing to impose the penalty. All of these factors, along with the increasingly common imposition of death sentences in general, strongly suggest that more minors will receive capital sentences in the years ahead, unless there is judicial recognition that the death penalty is unconstitutional when imposed on these very young offenders." Capital Punishment For Minors: An Eighth Amendment Analysis, Vol. 74, The Journal of Criminal Law and Criminology, No. 4 p. 1471, 1485 (1983).

Complaint is made that some youthful offenders are eligible for capital punishment even though they suffer -- or enjoy as the case may be -- legal disabilities preventing them from voting, owning property, being drafted, contracting, drinking, and serving on a jury. Amici discern no inconsistency here. It is as a matter of convenience and economy that privileges and disabilities are conferred upon youths, to protect them as well as the adults with whom they interact. The government could not very well be expected to conduct a trial-type hearing, complete with the opportunity for exhaustive appellate review, every time a twelve-year-old thought he was mature enough to begin voting or driving a car. The presumption of immaturity in those situations is, of necessity, conclusive. That presumption must give way, however, in instances where the government endeavors to enforce its laws by punishing criminal offenders on a case-by-case

basis. There the presumption yields to convincing evidence that the accused, having engaged in proscribed activity, and being possessed of adult characteristics, deserves punishment as an adult offender.

E. The States Must Be Allowed To Punish Capital Offenders Consistently, According To Their Relative Degrees Of Culpability Rather Than Simply By Their Birthdates.

The case-by-case analysis urged here is fair to all concerned. It does not require, as the petitioner's "bright-line" approach would do, that capital offenders otherwise factually and legally indistinguishable be eligible for vastly different punishment simply by reason of their birthdates. As the Court recently observed in Buchanan v. Kentucky, ___U.S.___, 107 S.Ct. 2909, 2915 (1987), the states have a compelling interest in promoting consistent results, which in turn foster public confidence in the criminal justice system. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency,

or not at all." Eddings v. Oklahoma, supra at 112, citing Lockett v. Ohio, 438 U.S. 586 (1978). "[T]he rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency." Eddings, supra at 112.

Surely the Constitution allows states to consider factors other than chronological age in determining whether an offender is a youth or an adult. In Eddings, supra at 116 the Court noted that "youth is more than a chronological fact." None of the studies relied upon by the petitioner claim that youthful offenders invariably are less mature or sophisticated than adults. While it has been suggested that youthful offenders generally behave more impulsively than adults, there are many exceptions to the rule. Sentencers should be permitted an opportunity to evaluate whether or not the defendant before them has, in fact, behaved impulsively or whether the youth has acted with adult deliberation.

We are not unaware of the extent to which minors engage increasingly in violent crime. [footnote omitted] Nor do we suggest an absence of legal responsibility where crime is committed by a minor. Eddings, supra at 116.

Many of the capital crimes committed by youthful offenders demonstrate the same degree of cruelty and premeditation seen in capital cases involving adult offenders. See, e.g., State v. Battle, supra (eighteen-year-old defendant brutally beat, robbed, raped and murdered an eighty-year-old woman, leaving her to die with a knife protruding from her eye); Trimble v. State, supra (1984) (seventeen-year-old defendant kidnapped, raped, assaulted and murdered his victim, beating her head and body with a baseball bat, and cutting her throat from "ear to ear" to ensure her death); Burger v. Kemp, ___ U.S. ___, 107 S.Ct. 3114 (1987) (seventeen-year-old petitioner, a U.S. Army Private, participated in the kidnapping, robbery, oral sodomy and anal sodomy of a taxi driver whom he murdered

by locking him inside the trunk of the cab and submerging it in a pond); Stanford v.

Commonwealth, Ky., ___ S.W.2d ___. Nos.

83-SC-65-MR & 83-SC-66-MR, Slip Opinion (decided April 30, 1987) (seventeen-year-old defendant^{9/} participated in the robbery, kidnapping, rape, oral sodomy, anal sodomy and execution-style murder of a gas station attendant, after which he laughed and boasted to others while awaiting trial). The foregoing are not mere youthful pranks, but are a few examples of the uniquely violent, premeditated crimes being committed by youthful criminals. The singular cruelty inflicted by such individuals cannot reasonably be ascribed to mere "impulse", as the briefs on behalf of the petitioner would prefer to do. Instead, crimes such as these manifest the maturity and sophistication of an adult mind,

^{9/}. His sixteen-year-old codefendant was David Buchanan. See Buchanan v. Kentucky, supra.

despite the offender's chronological age.^{10/}

States should not be required to punish youthful and adult murderers differently when there exists no rational basis for doing so. States recognize the special mitigation of youth and give sentencers the opportunity to evaluate that factor in sentencing youthful killers. It is quite enough that in most states, trial judges indulge a rebuttable presumption of

^{10/}. Upholding the death sentence of a seventeen-year-old offender in Trimble v. State, supra at 1163, the Court said: "Trimble's crime was not a youthful prank; it was a cold brutal act of repeated and sadistic violence." The Maryland Supreme Court's opinion contains an excellent discussion of the issue presented in this case. There it was noted that, "[S]eventeen-year-old youths can be deterred from committing brutal rape-murders so the legislature's judgment in that regard is not a purposeless act." Id. at 1164. The Court concluded that, "[A] case by case approach not only affords the individualized consideration warranted in death-penalty cases, but it also avoids the arbitrary line-drawing that is endemic to any hard-and-fast distinction between juveniles and non-juveniles." Id. at 1164.

chronological immaturity, prosecutors bear the burden of disproving immaturity, juries consider youthfulness in determining punishment as well as guilt, and appellate courts examine youthfulness when assessing the appropriateness of the sentence.

F. The Petitioner's Per Se Rule Would Establish Precedent For Undeserved Exemptions Of Other Age Groups, Even In Non-Capital Contexts.

To adopt the per se or "bright line" rule urged here by the petitioner and his supporters would only invite further claims that other age groups must be exempted from capital punishment, e.g., minors, "young adults",^{11/} the elderly,^{12/} and that juveniles must be

^{11/}. The amicus brief filed in this case by the National Legal Aid and Defender Association urges that, "[A]dolescents should be spared from the death penalty, at least until they reach age 18." (p. 21, emphasis added). Page 19, note 21 of the same brief advises that, "Adolescence lasts roughly from age 12 to 19." (emphasis added).

^{12/}. The amicus brief filed in this case by Amnesty International suggests an age "limit of 70 years." (page 31).

exempted from life imprisonment if they may be criminally punished at all.^{13/} As was observed in McCleskey v. Kemp, ___ U.S. ___, 107 S.Ct. 1756, 1779-1781 (1987), the consequences of such a holding should be considered by this Court. There the Court noted the endless ramifications that a claim such as McCleskey's would generate if accepted.

The petitioner and his supporters would not hesitate to conclude that an adult having the mental and emotional maturity of a six-year-old child should be spared from capital punishment. They are willing to consider individual differences in that kind of situation, yet would refuse to do so where a fully mature seventeen-year-old offender is concerned. Amici consider such a position untenable and totally devoid of logic.

^{13/}. Capital Punishment For Minors: An Eighth Amendment Analysis, supra at 1492, ventures that a State may never impose its maximum penalty upon youthful offenders for even non-capital crimes.

CONCLUSION

WHEREFORE, Amici respectfully urge the
Court to affirm the judgment below.

Respectfully submitted,

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